DIRLETON's Doubts and Queſtions IN THE LAW OF SCOTLAND, Reſolved and Anſwered.

By Sir JAMES STEUART of *Goodtrees*, Late Lord Advocate for Their Majeſties King WILLIAM and Queen MARY, and Her late Majeſty Queen ANNE.

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SCOTLAND

DELINEATED,

COLLECTED BY THE AUTHOR OF SIR ANDREW WYLIE.

Doubts and Questions

Addressed to

DIRECTORS

Advertisement.

THE *Doubts* and *Queſtions* in Law, collected by the learned Sir *John Nisbet* of *Dirleton*, who was *Lord Advocate* and One of the Lords of Seſſion, in the Reign of King *Charles* II. are here *Reſolved* and *Anſwered* by the deceaſt Sir *James Steuart*, who alſo held the ſame Office of *Lord Advocate* above Eighteen Years, in the Reigns of King *William* and Queen *Mary*, and of the late Queen *Anne*: And, in the Judgment of All, did very worthily ſuſtain the Dignity of that eminent Station.

HIS ſuperior Knowledge in the Laws, (which was but the leaſt Part of his Character) and his ſingular Faculty of ſolving Difficulties; did render him fully Equal for an Undertaking of this Kind: And, if this Eſſay ſhall be found to bear any Proportion to the Reputation of the Author, it will certainly be very acceptable to all that can uſe it.

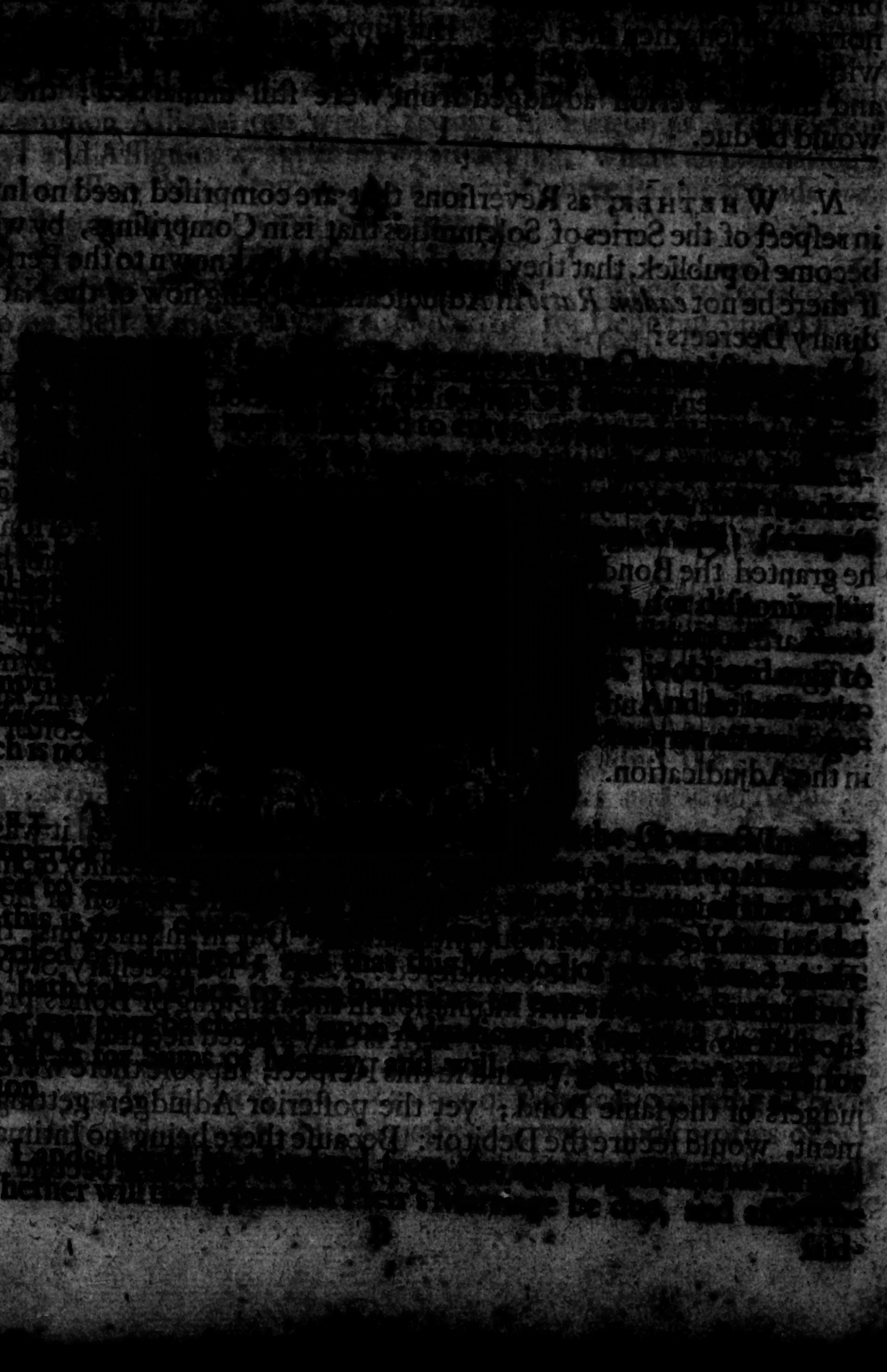
THE

THE Manuſcript was reviſed once by Himſelf; but he deſigned a ſecond Review before Publication: And 'tis a Loſs, it was not done; for ſome Additions and Enlargements would, probably, have followed upon it.

THE *Queſtions* are ſeverally premiſed in *Dirleton*'s own Words and Method, and diſtinguiſh'd by the Firſt Letter of his Surname, as the *Anſwers* or *Remarks* are by that of Sir *James Steuart*'s.

THE *Index* is placed at the End of the Book.

DIRLE-



faids Lands, in Prejudice of the Adjudgers? ANSWER. Albeit that it appears [illegible] to fu[illegible] which he m[illegible] mong[illegible] have found [illegible]

S. [illegible] nds, if the [illegible] the Age of Marriage, (Fourteen, for Example) before the Adjudication; the Marriage (that is, the liquidate Avail thereof, will affect the Adjudger: For it becomes *debitum Fundi*. But if the Lands were adjudged from the apparent Heir in his Pupillarity, and before the Marriage fell due; then the Question is greater, specially if the Superior be charged [illegible] the Superior, if he enter the Adjudger upon the Charge, then he [illegible] both the Ward of the Lands and the Marriage, if not expresly reserved: But if he refuse the Charge, the same will not prejudge him as to the Ward of the Lands that vaked before; but it may prejudge him as to the Marriage, since it was not then due: And if the Adjudication be suffered to expire, the Adjudger will carry the Lands free of the Marriage, only the Minority will lengthen the Legal. But suppose the Adjudication to be satisfied within the Legal, or that the Superior had himself satisfied the Adjudication, and that the Person adjudged from were still unmarried; the Marriage would be due.

N. WHETHER, as Reversions that are compriſed need no Intimation, in reſpect of the Series of Solemnities that is in Compriſings, by which they become ſo publick, that they are preſumed to be known to the Perſon liable; If there be not *eadem Ratio* in Adjudications, being now of the Nature of ordinary Decreets?

IF at leaſt there be a Difference betwixt Bonds and Reverſions, ſo that as to Bonds when there is a Competition of Two Compriſers, the Poſterior intimating ſhould be preferred?

AN heretable Bond being adjudged, tho' there be no Neceſſity of Intimation, becauſe Adjudications and Compriſings are publick Rights upon Record: *Quæritur*, If the Debitor paying *bona fide* to the Perſon to whom he granted the Bond, will be *in tuto*, the ſaid Adjudication not being intimate? ANSWER, It is thought, That he ſhould be *in tuto*; ſeeing Intimations are required for Two Effects, viz. Either to complete the Right by Aſſignation; or, To certiorate the Debitor, that he make Payment to no other Perſon. And tho' an Adjudication be ſufficient as to the ſaid firſt Effect, an Intimation is neceſſary as to the other, unleſs the Debitor be called in the Adjudication.

S. WHEN Reverſions or Bonds were of old appriſed, it was thought, that the Appriſing gave a complete Right, without Neceſſity of Intimation: And it is thought, that an Adjudication of either Reverſion or Bond would have the ſame Force without Intimation. But in Intimations, theſe Two Things above are to be conſidered: 1. As it is a neceſſary Step to perfect the Right, and ſo the firſt Intimation in the aſſigning of Bonds prefers even the poſterior Aſſigny: Or, 2. As it is only a Deed needful to put the Perſon concerned *in mala fide*. And in this Reſpect, ſuppoſe there were Two Adjudgers of the ſame Bond; yet the poſterior Adjudger getting firſt Payment, would ſecure the Debitor: Becauſe there being no Intimation made by the firſt Adjudger, he was *in optima fide* to pay to the Second. But whe-

the

ment, [illegible] fue his Warrandice against the second Assigny. But 'tis thought, That tho', [illegible] notwithstanding [illegible] the Payment, unless the first Apprising [illegible] Interest of Commerce, that the second Assigny getting the first Payment, should be preferred and secured [illegible] for his Neglect to intimate. And this Rule I would incline to [illegible] competing, but in the Case of an Assigny and Arrester, that is, that the first Assigny should always be preferred to the Arrester, even without Intimation, unless the posterior Arrester do first receive Payment *bona fide*. And thus I would also prefer the Arrester perpetually to a posterior Assigny, whether intimating or not: But our Pratique distinguishes, as hath been said, betwixt common Assignations which require Intimation as a completing Solemnity, and Assignies by apprising or adjudging, where an Intimation is no further necessary than to put *in mala fide*, and where Payment made *bona fide* to a posterior Apprifer would be sustained.

N. If Superiors who are Subjects only, will be obliged to receive Adjudgers to be their Vassals, having adjudged not for Debt but upon Dispositions? And if the King be in another Condition?

If upon a Disposition, the Receiver should obtain Sentence for Damage and Interest against the Disponer his Heir, for Implement; If, in that Case, the Adjudger ought to be received? *Ratio dubitandi*, That *Primordium inspiciendum est*: And upon the Matter there was not a Debt *ab initio*.

S. These Two Questions are noticed above.

N. If a Reduction *ex capite minoritatis*, not being intented at the Instance of the Minor *jus actionis*, may be adjudged?

S. A Minor or Major disponing validly, the Person to whom he disponed being hindred by a prior Disposition, may no doubt reduce the same *ex capite minoritatis*, just as his Author might have done; and so an Adjudger may do, if in the place of the second Disposition.

Advocation by the Justices.

N. IF the Justices may advocate to themselves Criminal Processes depending before Lords of Regality or other Judges? It is thought the Lords of Justiciary cannot advocate: The taking or advocating Processes from a competent Judicatory, upon Reasons of Advocation, being a Power and Prerogative belonging to His Majesty's supreme Judicatories of Session and Council; and Reasons of Advocation, either upon Suspicion, or

S. After the Court of Justiciary was reformed, and of new constituted by the Act of Parliament [illegible] there has been no Difficulty made in their advocating to themselves [illegible] from before Regalities or other Judges; and the Justices [illegible] the Reasons of Advocation in the ordinary Form, [illegible] the Power of the Advocation always said Caution; and they indeed [illegible]

And seeing the said Act of Parliament, upon that Reform, thought fit to discharge the Office of the Privy Council's appointing Assessors to the Justice-Court: It may be also justly thought, that it's Sovereignty on Criminals is thereby fully established, and that Regalities ought no more to repledge from them; nor in effect need they so much as allow the Bailie of Regality to sit with them, tho' this seems to have been permitted by Act of Parliament 74. VI. Par. 11. Cap. 29. But the Unlaws and Penalties which by the foresaid Act of Parliament would fall to Regalities, if Repledging were still in use, should not be denied.

Alimenta.

N. Constituto semel alimento, quo nihil in jure magis favorabile, aut magis personale, de eo nec alienatio nec transactio rite celebratur; datur enim ut persona exhibeatur & utcunque vitam tolleret. Mirum igitur Advocatos primi ordinis tanto conatu & cœtu summâ ope annisos, ut judicibus persuaderent aut imponerent, asserentes, alimentum uxori constitutum, juri mariti obnoxium esse, vel saltem creditoribus mariti esse integrum illud afficere. Quod enim ossibus hæret, nec a persona cui competit avelli aut alienari potest, illud nec juris ministerio, aut fictione transfertur. Quum igitur alimentum adeo personale sit (ut superius diximus) ut alienari nequit ita ut ab uxore nubendo, in maritum non possit transferri tacita & quasi alienatione, sublato jure mariti, jus creditorum, quod subit in consequentiam & ut accessorium, corruit, nec subsistit magis quam accidens sine subjecto, Broomhall *contra* Darsie 7. Julii 1678.

S. An Aliment freely and rightly constitute should certainly be observed as personal in the strictest Manner; and therefore a Woman, having an Aliment so constitute in her favours, doth not by Marriage transmit the same to her Husband *jure mariti*, far less to his Creditors or Assignies, but he may allenarly partake with her in the Benefit thereof for their joint Sustenance; for this appears to be the undeniable Consequence of their *becoming one Flesh.*

Altarage.

N. SOME Lands being founded by a Burgess of *Dumfermling*, to an Altar in the Church of *Dumfermling*, for Maintenance of a Chaplain at St. *Mary*'s Altar there; and it being provided by the Foundation,

That

Then the Founder and his Heirs Male do present the Chaplain: the ſaids Lands being after feued, and ſince diſponed; Queries, How ſhall the Purchaſer be infeft? This Caſe is not under the Act of Parliament anent Laick Patronages, the Caſe there being of Patronages whereof there is Infeftment holden of the King; Whereas the Patronage in Queſtion is not by Infeftment, but Proviſion, as ſaid is. It is thought, That the Chaplain is Superior; And if there be none, a Chaplain ſhould be preſented. *Curiæ.*

Quæritur, The Patronage being to the Heirs Male of the Founder, and if they do not preſent within Days, the Dean of Guild of that Town ſhould preſent; Whether the Heir Male may diſpone the Patronage? *Ratio dubitandi*, The Proviſion in the Foundation is not in favours of Aſſignies, and the Founder had Confidence only in his Heirs: And ſuch an Intereſt being religious, and provided to a Family with the ſaid Subſtitution, is not *in Commercio*. *Renunciatur.*

S. The Caſe of this Altarage in *Dumfermling*, ſeems to be included in the general Act of Parliament 1661, in favours of Laick Patrons of Provoſtries, Prebendaries, Chaplainaries and Altarages: For the Reaſon of that Act is, That the Vaſſals of Lands belonging to theſe Altarages, may not remain in the Uncertainty of their Superiors, by Reaſon there is no publick Regiſter of thoſe provided to the Title thereof; which holds in this Caſe in the Altarage of *Dumfermling*. And the Diſtinction, as if this Patronage were not by Infeftment holding of the King, but by Proviſion, ſeems to be groundleſs. And farther 'tis thought, That this Patronage provided to the Founder and his Heirs Male, is both adjudgeable and ceſſible: For ſince the Reformation from Popery, and the old Acts of King *James* VI. ratified by the ſaid Act 1661, theſe Rights may ſeem to ceaſe from their being religious, and that Notion they had before.

Annexation to a Barony in another Shire.

N. WHAT is the Effect of Annexation of Lands, lying within one Shire, to a Barony lying within another? Whether it be Annexation only, that one Saſine may be ſufficient for all the Lands, tho' in ſeveral Shires? Or, that Inhibitions and other Diligence ſhould be uſed at the Market-Croſs where the Barony lyeth?

S. These Annexations are no wiſe convenient, yet ſuch there are: And the Effect of them ought only to be betwixt the Superior and his Vaſſals or Tenents; and to make one Saſine ſerve within the Barony in the Terms of the Annexation. But ſuch private Rights ſhould no wiſe derogate from the publick Law and Utility, as to Inhibitions and Interdictions; which ought to be execute and regiſtrate where the Lands ly, as the Act of Parliament preſcribes. And how theſe Annexations ſhould be obſerved in the Service of Heirs or other legal Diligence, may ſtill be Ground of Queſtion: Only this Rule appears to be both juſt and reaſonable, That, where the Annexation cannot be obviouſly known by any publick Regiſter, it needs not be obſerved.

Annualrent.

N. A Whole Barony of Land being affected with an Annualrent, and being thereafter diſponed in ſeveral Parcels to diverſe Perſons; If one of the ſaids Purchaſers ſhould be diſtreſſed for the whole Annual-

Parts, they being *Pro rata valentiæ*.

S. If a whole Barony be affected with an Annualrent, and afterwards diſponed in Parcels; no doubt any of theſe Parcels may be diſtreſſed for the whole Annualrent; *Nam quælibet glebæ ſervit.* But it is moſt reaſonable, that the Purchaſer of that Parcel ſhould have his Relief proportionally off the Remainder; for which he may compel the Annualrenter to make over his Right to him, unleſs the Purchaſer be precluded by the Terms of his own Purchaſe.

N. A Perſon being infeft in an Annualrent irredeemably, ſo that neither the Heritor may redeem, nor the Annualrenter may require his Money; and the Annualrenter not being Creditor, but upon the the Matter *emptor annuus redditus: Quæritur*, Whether ſuch Annualrents will be liable to ſubſequent Laws, reſtricting and leſſening Annualrents? *Ratio dubitandi*, Theſe Laws do militate only in the Caſe of *Mutuum*, which is not here; there being neither *Sors*, nor *Uſura*, nor *Debitum* as to the principal Sum. And tho' ſuch Annualrents be conſtitute with reſpect to the Sum that was payed, and the Annualrents thereof current for the Time, that does not alter the Caſe. Seeing the Property of Lands is only bought with the like Conſideration; and the Annualrents of Money might have been hightened; and the Annualrenter wants the Benefit competent to him in the Caſe of *Mutuum, viz.* in the Caſe of Money lent out for Annualrent, he might uplift the Sum, and imploy it more profitably than for a ſmall Annualrent.

S. Where an Annualrent is diſponed irredeemably that is without the Power either of Redemption or Requiſition, there is no *Mutuum* in the Caſe; and therefore this Annualrent doth neither riſe nor fall as other Annualrents *in mutuo*, do: But it will be liable to all publick Burthens according to its Value as, Lands are.

N. An Annualrent being diſponed to be uplifted out of Lands and Teinds, and Infeftment following thereupon: *Quæritur*, What will be the Effect of the ſaid Right as to the Teind; ſeeing the Ground cannot be poinded for the ſame, theſe not being *fundus? Anſwer*, The Right of the Teinds might be appriſed, and a perſonal Action will be competent againſt the Heritor of the Teinds, during his Occupation.

S. If an Annualrent be diſponed by an Heritor out of his Lands and Teinds, where he hath Right to the Lands only by Infeftment, and to the Teinds, it may be, by Tack: Yet the Annualrenter coming to poind, may certainly poind the Fruits without Diſtinction. For, ſuppoſe that the Heritor ſhould give the Annualrent to be uplifted only out of his Lands, without mentioning the Teinds; yet, if he had Right and were poſſeſſed of the Lands, the Annualrenter would poind the Rents and Fruits, without Diſtinction; becauſe by his Annualrent, he hath Right to uplift the ſame out of the whole Fruits; and, if there be none to oppoſe, to his poinding a ſeparate Right to the Teind (as here there is none) the Teind muſt be poindable with the other Fruits.

But put the Caſe, That a Tackſman of Teinds diſpones an Annualrent out of the Teinds he hath in Tack, 'tis there indeed plain, that this Annualrent can no more be poinded for, than the Teinds themſelves. But the Right of Annualrent would be all conceived, if it

did

did not bear an Allegation from the Granter of his Lack of Lands *pro tanto*.

N. An Annualrent being diſponed to be by Infeftment out of ſeveral Lands lying diſcontigue. *Quæritur*, If the Diſponer may unite the ſame, ſo that One Infeftment, taken at One of the Lands, may be ſufficient for the other's?

S. If a Man ſhould diſpone an Annualrent out of Lands lying diſcontigue, and appoint a Saſine at One of the Lands to be ſufficient for all, it would not hold: For no Subject can make an Union; the uniting of Lands being proper to the Sovereign.

Annualrent for Damage.

N. Quer. IF the Defender ſhould be liable for Annualrent of the Price, in ſo far as it is more nor the Worth of the Lands? It is thought not, becauſe the Sale is not certain, and the Defender may get a Buyer at the ſame Price: And that the Defender was *in bona fide* to contract with a Pupil ſo authorized; and if he have Prejudice, he ſhould have Recourſe againſt his Tutor's Repreſentatives: And Annualrent is not due for Damage and Intereſt, until it be declared. *Tweeddale* contra *Drummelzier*.

S. When Damage is due, Annualrent is ordinarily thought an equal Eſtimate. But in the Caſe here pointed at, there was no Damage found for an alledged lower Rate of Lands; in reſpect the Bargain was lawfully made: And in ſuch Bargains of Sale, Leſs or More, unleſs it be enorm or fraudulent, makes no Damage.

Right of Annualrent.

N. A PERSON having diſponed Lands with a Procuratory of Reſignation and Infeftment to the Buyer of the Lands, and for Security to himſelf, of a Part of the Price for an Infeftment of Annualrent redeemable upon Payment of the Sum, and with a Clauſe, likewiſe That the Infeftment ſhall expire, *Quæritur* 1*mo*. If there be Prejudice to the Buyer, that his Right ſhould be ſo affected, being his Ground-Right? *Anſwer*. It is thought, there is none; ſeeing upon Payment, if the Party deſire, there may be a Renunciation upon the Back of both Charter and Saſine relating to another of the ſame Date to the Effect it may be regiſtrate.

2*do*. *Quæritur*, If the ſaid Right, being to be holden of the Superior, may be extinguiſhed without Reſignation? *Anſwer*. It, being only a redeemable Right after Redemption, in Strictneſs of Form cannot be reſigned; becauſe it is looſed. And formerly, in Wadſets of Property, the Superior upon the Redemption did grant Precepts. And a Right of Annualrent cannot be reſigned for a new Infeftment given to the Heritor's Superior; that being inconſiſtent with the Property in one Perſon: And therefore a Decreet of Redemption, with the Clauſe foreſaid Reſolutive in Caſe of Redemption relating to both, doth ſufficiently extinguiſh it. And if there ſhould be a Reſignation in the Superior's Hands,

[illegible] but to the Effect the Annualrent might be renounced, and consolidate with the Property, with the Superior's Consent.

S. This Case here is not ordinary, and not directly set down. But there appears nothing material to be marked upon it. For an Annualrent, constitute by Infeftment, if to be holden of the Disponer, is extinguished by a Renunciation: And if to be holden of the Superior, the Renunciation may further bear a Resignation back in the Superior's Hands, neither *in favorem*, nor *ad remanentiam*, but expressly to extinguish the Annualrent, that it may be no more a Burthen upon the Disponer's Property.

Relict's Annuity.

N. WHEN a Husband is obliged and his Heirs to pay an Annuity to his Wife in Liferent, if other Creditors be about to do Diligence, and compriſe after his Death: *Quæritur*, If the Relict may not purſue the Heir to ſecure her, and for that Effect, to grant Infeftment of Annualrent; and upon a Decreet, adjudge an Annualrent upon that Ground, *Quando aliquis conceditur aut disponitur, conceduntur omnia sine quibus non potest explicari*, and the Obligement, for the Annuity will be otherwiſe void?

S. It is ordinary, for a Wife to have her Husband and his Heirs obliged to pay to her a Liferent-Annuity: And if this Obligement be not performed, and Creditors appear, the Wife or Relict is hardly put to it. And therefore it ſeems juſt, that ſhe may purſue the Husband's Heirs to grant her an Infeftment of Annualrent: Or, if he failzie, that ſhe may have an Annualrent adjudged to her. But this Caſe remains ſtill a Difficulty in our Pratique.

Annus utilis.

N. *ANNUS utilis duplex eſt. 1. Ratione initii, ut initium ſit utile, & poſtmodum dies continui. 2. Ratione omnium dierum, ut Actor habeat poteſtatem agendi; Reus, reſpondendi; & dies ſint judiciales*, Thel. *Beſold* in Lit. *I.* 51.

S. This and the four next following Titles, *viz. Appellatio, Appellatio a Camera Imperiali, De Appellatione a Præfecto prætorii & aliorum Judicum ſententiis, Appellatio a Vicario*; being only Citations, there is nothing to be marked upon them.

Approbatio.

N. *NULLA Exceptio aut Allegatio in Foro, magis trita aut frequentior eſt illa de Approbatione aut* (*ut loquimur*) *de Homologatione, quæ illa Regula tuti videtur*, Quod approbo non reprobo. *Sed cum omnis definitio in jure ſit periculoſa, & iſta ut omnis materia Brocardica variis ſubſtringitur limitationibus. Aut enim Approbatio juris alicujus celebratur expreſſa ratificatione, & ita agitur ut approbetur; & eo caſu reprobare quod approbavit, nulli licet, nec honeſtum eſt. Aut aliud agitur, ſed ex actu colligitur*

S. These *Latin* Cases are plain, and have no Difficulty? Brocard, *Quod approbo non reprobo*, is often objected in a doubtful constructive Sense, for which no certain Rule can better [illegible] no Doubt the Invention of the Contrary [illegible] the best Direction [illegible] there was any Design to [illegible] where the Particular is by nothing [illegible] Case of Arrestment upon [illegible] is made to mention the [illegible]

N. If Arrestment be [illegible] whatsoever Hinds the [illegible] thereto? Or, if it be only [illegible] ture of Inhibition *in rebus*, [illegible] that is arrested, [illegible] effectual?

S. There seems to be Place here for a Distinction of the Thing arrested: For if it be a [illegible] ment doth more affect it. And yet if one Creditor [illegible] and Species belonging to his Debitor; and another, having more *Jus ad rem extraneam*, should come [illegible] preferred, just as an Adjudger [illegible] with this Difference, that the Adjudger [illegible] Debt prior to the Inhibition, because [illegible] ing of Debts, as well as annailzieing of the Subject: But in the Case of an Arrestment, the Debitor, whose Goods are arrested, is not prohibited to contract Debts: So that a Creditor [illegible] Debt, will have the Benefit of [illegible] would also hold in the Arrestment of Sums of Money. For if one Creditor should arrest a Sum, and another, even a posterior Creditor, both arrest and obtain [illegible]

But it is rather [illegible] And if by the *Divino nutu*, be meant the [illegible]

in whose Hands the Arrestment is made, dying, his Heir [illegible] may pay without Regard to it; And yet 'tis thought the Arrestment even in this Case would hold. For it seems unaccountable, that a prior Arrester should be postponable to an Assignay. And yet, if the Person in whose Hand the Arrestment is made should come to die, his Heir or Executor may pay to the Assignay; and so the Assignay get the Preference of the Arrestment, tho' prior and once preferable. Besides, in Inhibitions, tho' the Person inhibited only, and not his Heir be thereby bound; yet the Act of Parliament 1661. prohibits the Heir to alienate for a whole Year, which is a Remedy; But in the Case of Arrestment there is none, if the Arrestment affect the Person only in whose Hands it is made; and yet it is like it would be so found.

N. If the Goods in the Hands of the Debitor, upon Arrestment, may *habili modo* be craved to be forthcoming? Or, if *habilis modus* of all Goods (but Money) be to poind or apprise; the Propriety of *corpora* being only transmitted *per traditionem*?

S. It is hard to say what should be the Effect of an Arrestment in the original Debitor's own Hand; for it may be thought he can safely annailzie them, because of the Freedom and *bona fides* of Commerce, where the Purchaser is by nothing obstructed. And in Effect, the Force of Arrestment appears to be, to hinder a Person, in whose Hands it is made, to annailzie the original Debitor's Goods; or to pay to him, to the Prejudice of the Arrester. So that Arrestment seems only to be a Restraint upon another Person, having the Possession or Right of Retention of the Debitor's Goods; but not upon the Debitor and Proprietor himself; the *habilis modus* of affecting Movables in a Debitor's own Hand, being only by Poinding. Whence it appears, that an Arrestment, in the Debitor's own Hand, of Goods in his own Possession, whether upon a Decreet or Dependence, signifies nothing.

N. If Arrestment upon a registrate Bond may be loosed, being before the Term of Payment?

S. Arrestment may be raised and executed upon a Bond before the Term of Payment: But then 'tis thought, it may be loosed upon Caution; for it cannot be judged to be an Arrestment upon a Decreet, tho' the Bond be registrate, because it is before the Term of Payment, as said is.

N. Whether, where there is nothing due by a Person in whose Hands Arrestment is made the Time of the Arrestment, the same will affect a supervenient Debt?

S. If Arrestment be made in the Hands of a Person who owes nothing to the original Debitor at the Time of the Arrestment, the same will not affect a supervenient Debt contracted or coming due be him

N. ... where the ... Arrestment dies with the Debitor, or doth effect after his Decease? If a Bond for loosing Arrestment be void through the Debitor's Decease?

S. Whether an Arrestment dies with the Debitor, in whose Hands it is made, hath been above discoursed, under the first Question of this Title. But where a Bond is given for loosing Arrestment, if that Arrestment fall through the Decease of the Person in whose Hands it is made, it seems the Bond for loosing of it must also evanish.

N. If at least an Arrestment upon a Decreet be of another Nature than that upon a Dependence, being in Effect *Pignus Prætorium* and Execution *pro tanto*? Or, If it should be at the most like a Denunciation whereupon Comprising has not followed in the Defunct's Time, which therefore is void?

S. An Arrestment upon a Decreet cannot be loosed, as an Arrestment upon a Dependence may be. But yet it will not hinder another Creditor to poind or obtain a Forthcoming in a due Course of Diligence, altho' both his Debt and Arrestment were posterior. But certainly an Arrestment on a Decreet does not fall by the Death of the Arrester; but his Heir or Executor will have the Benefit of it: So that it is not like to a Denunciation of Lands in order to Comprising. But an Arrestment on a Dependence must fall by the Death of the Arrester, because the Dependence falls by it.

N. Albeit an Arrestment doth not import a Right of *Hypotheque*, and that notwithstanding another Creditor may poind: *Quæritur*, If at least it should have that Effect, That the Person, in whose Hands the Arrestment is made, cannot pay the Debtor in Prejudice of the Arrester? And that as he cannot pay the Debtor, so after his Decease he cannot pay his Heir nor Executor, being *eadem persona*?

S. An Arrestment certainly hinders to make Payment to the original Debitor in Prejudice of the Arrester; and likewise to make Payment to his Heir or Executor after his Decease, seeing they are *eadem persona*; but not to another Creditor Arrester, if his Diligence prefer him.

N. Executors being in Competition upon Arrestment to make forthcoming, Whether they should come in all *pari passu*, notwithstanding some be before, and some after, as in the Case of Comprisings being both at one Time, tho' the Denunciation be at several Times?

S. It seems hard, that Arrestments allowed by Law to Creditors for affecting their Debitor's Moyables, should be computed so nicely as to be preferred by Days, and even by Hours: For, in Apprisings

and disappointed. But this requires an express Law.

M. [illegible] of Inhibitions, [illegible]

S. This Question is anſwered above. Q. E.

M. What is a Term from which a Sum date by a moveable Bond bearing Annualrent, and an Arreſtment laying ſtrong on the Debtor by the ſaid Bond: *Queritur*, Whether the ſaid Arreſtment ſhould be effectual only for the Annualrents already run, but theſe that ſhould accrue thereafter? [illegible]

S. The ſaid Arreſtment [illegible] on the Debtor's Eſtate, [illegible] may be affected by Arreſtment laying from the Date of the Obligation, *dies cedit*, though *non venit*.

S. An Arreſtment of a moveable Debt, as of a Bond bearing Annualrent, affects the *ſum debita*, and ſecures both the principal Sum with the bygone Annualrents and Penalties in Time coming, till the Sum be paid: But an Arreſtment of Mails and Duties can only affect bygone Mails and Duties, or the Mails and Duties for the Term current, but can never be extended to Mails and Duties before ever they fall due. For in Annualrents *dies cedit* at leaſt upon the Bond; and for Bygones both of Annualrents and Mails, *dies venit*; and for the current Mail, *dies cedit*. But for the Mails and Duties for Terms thereafter, *dies nec cedit nec venit*, and betwixt theſe differ from Debts due conditionally, or payable before the Condition exiſt.

M. If a Debtor be in Poſſeſſion of a Coal, or of a Mill in his own Hands, What Courſe can be taken by a Creditor to affect the Profits, which is a Dependence to ſecure the Profits before they be [illegible]

S. The daily Profits of a Coal or Mill in a Debtor's Poſſeſſion, can only be affected by Adjudging the Coal or Mill, or by Poinding, for they cannot be arreſted in the Debtor's own Hands, neither can they be uſurped upon a Dependence.

Arreſtment of conditional Debts.

N. IF a Creditor ſhould arreſt a Sum due to his Debitor upon a Wadſet, whereupon Infeſtment has followed, the import be of ſuch an Arreſtment, *Quære*, If Redemption ſhould follow, and after the Order, another Creditor arreſts, it is doubted that the Arreſtment before will be preferable; as in the Caſe of the Arreſtment of a conditional Debt, which will be drawn back, *exiſtente conditione, vid.* Wadſet Q. 1. Let.

S. A Sum due upon a Wadſet, whereupon Infeſtment has followed, is not arreſtable; nor can this Sum be called a conditional Debt in Caſe of Redemption: But ſo ſoon as the Order is uſed for redeeming, it may be arreſted; and the First Arreſter will be preferred.

Arreſtment looſed.

N. Quæritur, IF upon a Dependence or Bond unregiſtrate, there be Arreſtment laid on, and the ſame be looſed, and thereafter the Goods arreſted be poinded, the Cautioner for looſing the Arreſtment will be liable? *Ratio dubitandi* is, that the Goods were not fraudfully put away by the Debitor.

Quæritur, IF after the Arreſtment the Debitor contract Debts, and the Goods be poinded for the ſaid Debt, contracted after the looſing of the Arreſtment, *quid juris* will the Cautioner be liable?

S. AN Arreſtment on a Dependence, or Bonds unregiſtrate, being looſed; yet if the Goods arreſted be afterwards poinded, tho' for a Debt poſterior to the Arreſtment, a due Poinding or due Forthcoming will free the Cautioner in the looſing of the Arreſtment: For the Cautioner cannot be more ſtrictly bound, than that the Arreſtment ſhould hold and take Effect. But ſo it is, that even an Arreſtment upon a Decreet may be fruſtrate, by a poſterior due Poinding or Furthcoming: And therefore the Cautioner muſt alſo be looſed.

B.

Backbonds to the Exchequer.

THE Exchequer having granted Gifts, *V. G.* of Recognition, or others; but upon Backbonds in Favours of Creditors and of the Wife and Children: So that they have reſerved no Intereſt to the King, but to themſelves only, to regulate and arbitrate the diſpenſing the Benefit of the Backbond, in Favours of Creditors and the Wife and Children: May they proceed and apply the Benefit in Favours of ſuch as apply to them, without calling the other Parties? *It is thought*, that the Lords of Exchequer are to be conſidered as *Arbitri*; and that their *Arbitrium* is *regulatum*, and ſhould not be uſed without citing

ting of all their [illegible] upon [illegible] of Parties, they [illegible]

life, [illegible] the Rebels were [illegible] the Lords of [illegible] And no doubt there is the [illegible] interest to be [illegible] they get a Hearing either in the Case of Second Gifts, or [illegible] pension raised by the Bonatar. For in effect, the *arbitrium* of the Lords in this Case is not absolute, but subject to Rule.

Bairn's Part.

N. If a Son get a Portion in order to live upon it *seorsim*, and out of his Father's Family: *Queritur*, If he can be thought a Bairn, and claim a Bairn's Part, seeing he has not granted a Discharge, nor accepted the same in Satisfaction?

S. The Giving to a Son a Portion as a *Peculium* to live upon by himself, cannot be thought to cut him off from his Bairn's Part, or to hinder him to claim the same upon collating.

N. There being Three Heirs of diverse Marriages, and certain Provisions in Favours of the Heirs of the Marriage, made in the respective Contracts of Marriage? *Queritur*, If (there being no other Bairns *in familia*) they will have their Bairns Part notwithstanding they are Heirs? And if they have: *Queritur*, If they must confer their Provisions, if they be unequal? *Answer*, They will come in as Bairns. And as to the Second Querie, it is thought, they should not confer, seeing they have their Provisions not simply as Heirs, but as Children by the said Provisions.

S. The Three being Heirs by the said Three Contracts of Marriage, cannot be hindered to come in as Bairns, and claim their Bairn's Part. And, tho' their Provisions by the Contracts be unequal, they cannot be obliged to confer, because they have their Provisions by different Titles: but if such a Case should exist of a Man's leaving Children of Three Beds, all provided by their Mother's Contracts, each of the Three Sets would certainly claim their Provisions as Creditors; and if the Estate were moveable, would come in as Executors Creditors, and by Concourse get the same divided among them: And so, if the Father's Estate were heritable, they would still come in as Creditors, and be preferred according to their Diligence. So that here there seems little Ground of Question, either about *Bairns-Part* or *Collating*.

Bond heritable.

N. IF a Bond bearing an Entail of a Sum, *viz*, to the Creditor and the Heirs of his Body, which failzieing to a Brother or Heir of a Brother, who would not succeed either him or his Children, be heritable, in respect of the Entail, tho' Executors be not excluded; neither doth it bear a Clause of Infeftment?

Sum, at his Deceaſe, pertained, not to the Son, but to the Father's Executors. and came under Teſtament, as *Spotiſwood* marks, Title *Contracts*, 22 *Feb.* 1623. And in another Caſe, 16 *Jan.* 1630, he remarks, That a Bond being made to *John Johnſtoun*, and ſurviving of him by Death to *William Johnſtoun*, *John* dying before the Term of Payment, the Bond was found to appertain to *William*. And he ſays, the Matter was contentiouſly reaſoned among the Lords, ſome thinking it was *in bonis defuncti*, and diſpoſable by him. But he adds, That no Queſtion if *John* had outlived the Term, the Bond would have fallen to his Executors and not to *William* the Subſtitute. Whereby it ſeems, the Lords then thought, that a Subſtitution did only hold, where the Creditor died before the Term. But of this, no good Account can be given. For, as to their Reaſoning in the ſaid Caſe, 16 *January* 1630, that it was *in bonis* of the Creditor dying before the Term, and ſhould therefore go to the Executor and not to the Subſtitute, which is ſaid alſo to have been *Hope*'s Opinion; it bears no good Senſe. For no doubt, the Bonds as above conceived are full *in bonis* of the Creditor, whether he die before or after the Term, and he ſubſtitutes to himſelf, becauſe he is Fiar; ſo that this can be no Reaſon to fruſtrate the Subſtitution. And therefore, 'tis thought, That now theſe Subſtitutions being, according to the expreſs Will of the Creditor, would hold, whether the Creditor die before the Term or after; for certainly ſuch was his Intention; and ſeeing this Intention may be well execute by a General Service, it may be thence concluded, that Subſtitutions ſhould hold even in ſimple Bonds bearing Annualrent; and that the Subſtitutes ſhould ſucceed as Heirs, and not only exclude other Executors, but that they need not confirm themſelves to be Executors. And as to the Repreſentation, they may be liable in as Heirs, ſome are of Opinion, that the ſucceeding as Heir in a certain Bond, and being ſerved for that Effect, imports no more than to make the Perſon liable for the Defunct's Debts and Deeds to the Value. But for certain, ſuch a Subſtitute may now enter Heir *cum beneficio*, and ſo be no further liable than an Executor. The Notion of *ſubſtitutio vulgaris* in Teſtaments among the *Romans*, hath occaſioned Miſtakes in our feudal Subſtitutions in Bonds by Way of Tailzie.

N. A BOND being granted to a Husband and his Wife, the longeſt Liver of them Two, and the Heirs of the Marriage, which failzieing, to the Husband's Heirs and Aſſignies whatſomever: *Quæritur*, Whether the ſaid Bond belongs to the Heirs or Executors of the Husband? *Ratio dubitandi*, It is granted ſince the Act of Parliament 1641. And the Act of Parliament 1661, and that Act 1641 are poſitive, that all Bonds for Sums of Money, bearing Annualrent, are moveable, except in the two Caſes therein expreſſed, *viz. Of an Obligement to infeft*, or of a *Clauſe ſecluding Executors*. And on the other Part, the ſaid Act ſeems only to intend Bonds containing Payment of Annualrent for Front, which upon that Account, before the ſaid Act, were Heritable after the

Term [illegible]
Account [illegible]
expreſly [illegible]
of Heirs of Provision of Per[illegible]
ritably ſuſtained for [illegible]
the Bairns of the Marriage [illegible]
cannot fall under Executry [illegible] taken to a Man and his
and as of the ſame Nature [illegible] ſeeing it implies the Clauſe
Heirs Male; which would not be [illegible]
Excluding Executors.

S. It is obvious, that this Bond, neither bearing an Obligement to infeft, nor excluding Executors, is moveable. But it is to be adverted, that it is one Thing for a Bond to fall to Executors, and another Thing, to be tranſmitted by Way of Executry: For in the firſt Place it excludes the Heirs; but in the ſecond, ſuch as are deſigned Heirs in the Bond, if moveable as ſaid is, are in effect Executors, who are likewiſe ſaid to be Heirs *in mobilibus*. Thus if a ſimple Bond be granted to a Man and his Heirs and Aſſignies without a Clauſe of Infeftment, tho' it bear Annualrent; yet it falls to his Executors: And this is the Reaſon why the Law requires, That in ſuch Bonds, Executors ſhould be expreſly excluded to make them Heritable, that is, not teſtable. As for the Caſe ſtated, If there were Bairns of the Marriage, the Bond would not fall to the eldeſt Son and Heir of the Marriage excluſive of the younger, but would fall to all the Bairns of the Marriage, either as Heirs of Proviſion, or as Executors, *perinde eſt*; ſince in both Ways it would divide equally, and with the ſame Hazard: For the Bairns, as Heirs of Proviſion, would only be liable *in quantum*; ſpecially if they ſerved *cum beneficio*: And if they ſhould all of them confirm Executors, it would have the ſame Effect; But as to the Subſtitution, *Which failzieing to the Man, and his Heirs and Aſſignies whatſoever*, there the *Heirs* would be underſtood the Executors excluſive of the Heir, the Bond being moveable, as ſaid is.

But here we may ſuppoſe a Bond to be granted to the Man only, and to the Heirs procreate betwixt him and his Wife for the Time; which failzieing, to the Man's Heirs or Aſſignies whatſoever: The Difference appears, that the Liferent is not provided to the Wife; and yet by this Deſtination, the Bairns of the Marriage would be only Heirs Portioners; for if they ſhould be reckoned Executors, the Wife might come in and draw a Third as Relict, unleſs the Bonds bearing Annualrent did exclude her. But this of bearing Annualrent is not to the Point: For, lay aſide Annualrent, and then the Import of the Heirs in the two Caſes may be beſt conſidered: And yet if this Bond not bearing Annualrent were granted to a Man and his Heirs and Aſſignies, without Limitation to the Marriage, the Bond would fall to his Executors excluſive of his Heir, and the Relict would get a Third thereof: For, Heirs here, are Heirs *in mobilibus*; and there being no Limitation, the Wife cannot be excluded.

N. When a Bond is taken to the Creditor, and failzieing of him by Deceaſe to another Perſon, bearing only Annualrent, and no heritable Clauſe. *Quæritur*, If the Creditor to whom it is granted may diſpoſe of it by Teſtament? *Ratio dubitandi*, it ſeems not to be heritable by the Act of Parliament. On the other Part, the ſaid Subſtitution imports the Executor to be excluded; and a Teſtator cannot diſpoſe by Teſta-

by Act of Parliament: And the Substitute having now Right to it, he is in the same Case as if the Bond were granted to him? *ex adverso*, the same being *semel* heritable, is *semper* heritable, until it be made movable by a Charge.

5. A Bond granted to a Creditor, and failing of him by Decease, to another Person, bearing Annualrent, but no heritable Clause; is not heritable in the Construction of the Act of Parliament: Yet by reason of the Substitution, it would not fall to Executors, even tho' it did not at all bear Annualrent? And on the other Hand, the Bond appears to be movable. And it seems very strange, that a Man should not testate upon such a movable Sum, no better than a Ticket, even on Death-bed.

Whence it would appear, 1. That wherever there is a Substitution, Executors are excluded; even as an Heir substitute doth always exclude the general Heir. And, 2. That a Substitution doth not so far alter the Nature of a Bond, as to make it heritable: But if it be otherwise movable, the Creditor Fiar of the Bond may dispose on it, even by Testament, tho' it would not fall to his Executors, and far less admit the Relict to have any Share in it. And thus, 3. we are led to a Rule, That Substitutions should always hold in the Terms thereof, to exclude the other Executors in Movables, as well as the Heir-general in Heritables: And that the Marks of a Bond's being heritable or movable, should be taken from the Act of Parliament; but that the Transmission may be by a Service in general, where there is no Place for Executors. I say, a Service in general; for there is a Difference betwixt a *general Service*, which gives the Heir served, Right to the *universum Jus* of the Heritage, and a *Service in general*, which only gives Right to that which would fall to the Heir, and needs no Infeftment. And thus an Heir of Provision, thereby getting Right only to certain Bonds, or Sums of Money, or Rights without Infeftment, may be served Heir of Provision in general, and so have Right to his Provision; and yet not be Heir-general, which is quite another Thing, and nevertheless has been grosly mistaken.

But these Things go a little too far, and, it may be, will seem too hard in our Pratique.

The next *Doubt* is, If a Bond granted to a Creditor, and failing of him by decease to another Substitute, will be in the Person of the Substitute heritable or movable? And 'tis thought, The Bond is movable, both in the Person of the Creditor and in the Person of the Substitute; so as both Creditor and Substitute may dispose on it even in Testament: But with this Difference, that it may transmit from the Creditor to the Substitute by a Service in general; tho' it must transmit from the Substitute to his Heirs, as to Executors in Movables? Which Things may appear Paradox. But the Ground of Mistake seems to be, the not due distinguishing betwixt what is heritable and what is movable; and the judging, that whatever is movable, must transmit by Confirmation. Whereas 'tis thought, That where a particular Subject is transmitted, from which Executors are excluded by the Destination, the Transmission may be by way of Service; and yet the Subject, if movable, still testable.

N. [illegible]

[illegible] Change [illegible] this Case would no more alter the Substitution, which is the express Will, than a Change of Lodging on a Bond excluding Executors, doth alter the Destination from the Heir, as the Lords have found, because of the Will expressed at first in the Case of a Bond heritable by Infeftment, a Change upon it will make it fall to the Executors. But this is reckoned only upon the presumed Will and the Change of the Nature of the Right.

However, in all this Matter, as to what is Heritage, what Executry, and as to the Transmission of Both, our Pratique is very uncertain, and needs a Regulation: and the Grounds above pointed at, are only reasoned upon, for more Light in this Matter.

Our old Pratique was, That a Bond bearing Annualrent was heritable, before the Act of Parliament 1641; and yet if the Creditor died before the Term of Payment, it was movable: And even then, it would have been a Doubt, What should become of that Bond, if it had born Annualrent from the Date, and not from the Term of Payment, as the Use then was? For the Character of Heritable or Movable, seemed then to depend upon the Annualrent. And yet *Spotiswood* observes, 26. *February* 1629. That a Bond granted at *Whitsunday*, to be paid at *Martinmass*, with the Half-year's Annualrent, under a Penalty, and bearing Annualrent thereafter, was found movable, the Creditor having died before the said Term of *Martinmass*. So that it seems, our then Pratique has proceeded on this Ground, That betwixt the Date and the Term of Payment, the Bond should be movable, as if the Creditor had been resolved to uplift it at the Term; but that after the Term, and if it did bear Annualrent, it should be heritable, as not to be uplifted but designed for the Heir, unless a new Deed intervened: And yet if, in a Bond then granted bearing Annualrent from the Date, the Creditor had died before the Term, it is doubted that it would have fallen under Escheat, altho' *Movable* and *Escheatable* then, were *pares terminis*.

But the true Ground and Principle of Law seems to be, That the setting of a Term of Payment signifies nothing, save to give a competent Ease to the Debitor; it being certain that even after the first set Term, the Creditor, at any other Term, or perhaps every Time thereafter might have charged upon the Bond; and yet unless that Charge had been given, the Bond had then been heritable.

N. If an heritable Bond may be compriſed, and if the Legal expire, will the Creditor have Right to the Sums therein contained, tho' far exceeding his Debt?

S. It may be thought, that in this Case, there should be no Legal, but that whenever the Comprifer gets Payment by the Sum compriſed, it should be the same as if he had poinded it: For, no doubt, a Compriſing in this Case doth only take Place, because of the heritable Rights compriſed, and not subject to Arreſtment and Furthcoming: For, it may appear to be a hard Case, that a Man, *for Example*, should adjudge an heritable Bond of it may be, Ten, or Twenty Thousand Merks for Payment of One Thousand; and that if the One Thousand be not paid, within the Legal, the exorbitant Sum apprised or adjudged should belong to him for ever. 'Tis true, as great Disproportions may be alledged betwixt Sums of Money and Lands adjudged for them, and the Rigour

[illegible]

N. A Person having given a Bond, to the End that thereupon a Comprising may be deduced against the Granter, for settling the Estate of his Father in his Person; and having granted a Backbond to pay the Person Granter of the Bond a Sum of Money, with Provision, That if he denude of the Comprising, he shall be free of Payment of the Money. *Question.* If the Sum be movable, so that the Relict of the Creditor may crave a Part thereof *jure uxoris*; in regard the Sum is in Obligatione; and to denude of the Right of the Comprising is as *factum de fluendo*? Mr. *Archibald Nisbet* [illegible].

S. Where a Bond is granted for a Ground of Diligence by an apparent Heir, upon which Adjudication is led, and the Adjudger grants Backbond to pay the Granter a liquid Sum of Money, but with this Quality, That if he denude of the Adjudication, he shall be free of the Backbond. It is thought, That seeing the Backbond comes in Place of the Adjudication for the apparent Heir's Security, and may be satisfied by denuding of the Adjudication, it appears more reasonable that this Backbond and the Sum therein should be heritable and belong to the Heir.

Bonds of Provision to Children.

N. A Father having granted Bonds of Provision to Children, with a Clause, That they should be valid, tho' not delivered. *Queritur*, The same being granted in *lecto ægritudinis*, if they should prejudge the Relict or Fisk? *Ratio dubitandi*, The Granter is Master of them, and may cancel and destroy them. Answer, *Si animus donandi*; and the Defunct did intend nothing but to provide his Children, they should be considered as a Debt.

S. When a Man in *lecto ægritudinis* grants Bonds of Provision to his Children, dispensing with the not Delivery; tho' he remain full Master of the Bonds, and may cancel them; yet they will be a Debt to affect the Executry, as any other Debt: But if they had been granted on Death-Bed, they would only affect the Dead's Part; at least not the Relict's. And so they would also affect the Granter's Heir.

Bond of Relief.

N. If a Person obliged conjunctly with another, upon a Bond to be relieved, may not, after Registration of the principal Bond, charge for Relief; and for that Effect, to pay the Sum, and pound for the same? *Forbes* contra *Udnie*.

Registration of this [illegible]
Bond: But if he have not [illegible] only charged for [illegible]
The Perſon for whom he ſtands bound, finding him good ſecurity for the ſurgence of his Relief, ſhould be no further liable: For it would be hard, that a Cautioner only charged, but not paying, ſhould, on Pretext of his Relief, have Acceſs to poind or diſtreis the Perſon of the Principal.

Baron-Courts.

N. Quæritur, IF the Superior may purſue before his Baron-Court for Nonentry, or Ward, or Marriage? *Ratio dubitandi*, That the ſaid Caſualities are *fructus* of the Superiority: And ſeeing the Baron may purſue his Tenents for the Fruits of Property, there is the ſame Reaſon that he ſhould purſue for the Fruits of his Superiority: And the Vaſſals have no Prejudice, but rather Advantage, that they are not taken from their own Houſes to anſwer before another Court, and to be at the Charges both of Attendance and Proceſs, which are greater there: And if the Bailie do Wrong, it may be repaired by a Reduction.

S. It is anſwered, Tho' by the Feudal Law, the Vaſſal might have been purſued for theſe Caſualities in his Superior's Court, and judged by his *pares curiæ*; yet our Pratique allows only Barons to purſue their Vaſſals and Tenents in their own Court for liquid Mails and Duties: But as to theſe greater Caſualities of Nonentry, Ward, or Marriage, wherein the Vaſſal may have ſeveral Defences in Law; they can only be purſued before the Lords of Seſſion, the Sovereign Court of Juſtice.

Baſtard.

N. IF a Baſtard has diſponed his Eſtate in *leige pouſte*, and Infeftment has not followed during his Life; Will the King or his Donatar be liable to fulfil the Diſpoſition?

S. THE King or his Donatar ſhould implement the Diſpoſition; or the Lands may be adjudged in Favours of the Receiver of the Diſpoſition. But ſome ſtill make a Queſtion, If the King, as *Ultimus hæres*, be liable to pay the Debt? Which, to me, is no Queſtion: For, whoever ſucceeds *in univerſum Jus*, without a Forfeiture, ſhould pay the Debts.

N. IF a Baſtard's Relict and Bairns will have their Legitime, tho' he cannot make a Teſtament? ANSWER, *Affirmative*.

S. THIS is granted. But it may be thought, ſeeing the lawful Children of a Baſtard do ſucceed to him as if he were no Baſtard, that in this Caſe he may alſo teſtate: For, 'tis certain, that the King's Right to a Baſtard's Goods is only Caduciary for his Want of lawful Succeſſion, there being no lawful Succeſſion with us ſave by the Father, and Baſtards are ſuppoſed to have no Father: But when a Baſtard has lawful Children,

dren [illegible] in
[illegible] only to [illegible] them
to [illegible] [illegible] children. But a Baſtard having Children, may certainly teſtate; and tho' he do not, his Children ſhould ſucceed.

N. If a Baſtard having Children may make a Teſtament, and name a Stranger his Executor, ſeeing the King has no Prejudice, and his Children cannot complain having their Legitime?

If at leaſt he may leave Legacies, and his Children Executors nominate at the leaſt neareſt of Kin, and Executors *ab inteſtato*, will be liable to the ſame?

S. No doubt, a Baſtard having Children may name a Stranger his Executor, for he may diſpone freely on his Dead's Part, ſince he hath Children to whom it was otherwiſe to have fallen, and they having their Legitime, cannot complain. And thus he may alſo legate on his Dead's Part, but a Legitimation is beſt to put this Point out of Queſtion.

N. If a Baſtard has *Teſtamenti factionem paſſivam*, and may be named Executor, or Heir of Proviſion? Answer, *Affirmative*.

S. That a Baſtard hath *Teſtamenti factionem paſſivam*, and may be either named Executor or Heir of Proviſion, ſhould not be doubted; for he hath all Liberty to acquire: And, it is the King's Intereſt it ſhould be ſo.

N. If a Baſtard may have an Heir of Tailzie and Proviſion?

S. No doubt, Lands may be diſponed to a Baſtard and the Heirs male of his Body, which failzieing to any Heir of Tailzie and Proviſion; for this is the Diſponer's Deed, and would hold if the Lands were diſponed to a Baſtard ſimply, and failzieing of him to a Subſtitute *nominatim*. And it's thought, it would hold tho' the Lands were diſponed to the Baſtard and his Heir of Tailzie, as ſaid is, by any Superior upon his own Reſignation: For ſtill, the King ſucceeds not in Lands to a Baſtard, but purely as *ultimus Hæres*, which here has no Place.

But put the Caſe, a Baſtard makes only a Bond of Tailzie to reſign his Lands in Favours of himſelf, which failzieing, *&c.* Here the Queſtion may ariſe, If the King as *ultimus Hæres* ſhould implement this Bond? I ſtill think he ſhould, and for the Reaſon above given: Only the Difficulty might be, how the Subject ſhould be ſerved Heir of Proviſion in general, that he might have a Title to purſue for Implement. And here I heſitate, becauſe a Baſtard not having lawful Children can have no Heir: But this militates alike againſt an Heir of Tailzie after Infeftment, if the Baſtard have not an Heir of his own Body to ſucceed him.

N. If a Baſtard by a Deed *inter Vivos* has diſpored his Eſtate in Lands by a delivered Writ, and dieth before the Right be perfected: *Quæritur*, What Way the ſame ſhall be perfected; or what Action is competent to the Perſon in whoſe Favours it is made, and againſt whom? Answer, It is thought, That the King being to ſucceed to the Baſtard, his Officers may be purſued, and the Director of the Chancery, if the Lands hold of the King (and if they hold of another Superior, the ſaid Superior) to hear and ſee the ſame adjudged, and Precepts directed.

[illegible] Diſpoſition in Liferent, [illegible] Claiſes, and Power to alter, [illegible] in this Caſe, being upon the Matter *Donatio mortis cauſa*.

S. If a Baſtard by a Deed *inter Vivos*, diſpone his Lands; and his Diſpoſition be delivered, but not perfected: The Receiver of the Diſpoſition has Action againſt the King, and his Officers of Bonitar as *ultimus hæres*; and therein may call either the Director of the Chancery (if the Lands hold of the King) or the other Superior, and ſo get them adjudged.

But if the Deed be not a ſimple Diſpoſition, but contain a Reſerve of the Diſponer's Liferent, or to a Perſon in Fie after the Death of the Diſponer, which is the ſame; and contain alſo a Power to alter: It's thought ſtill, the Diſpoſition is good, tho' it appear to be *Donatio mortis cauſa*; for ſuch Donations with us are ordinarily made by Deeds *inter Vivos*, and are not judged to be Teſtamentary, as they were conſtrued in the Civil Law. But of theſe Donations afterwards, and how they come to be revocable.

N. Quæ Ratio, That a Baſtard cannot make a Teſtament? Whether or not, *Ob maculam natalium*? Or, That by reaſon thereof, they were as *Dedititii* in Law; ſo that during Life they were *Liberi*, but died *Servi*, and *Nulli*; without Power to diſpoſe of any Thing? Answer, That the ſaid Incapacity was *Ratione Natalium*, ſeeing theſe who have no other Heirs (ſo that the King is to ſucceed as *Ultimus Hæres*) have not *Teſtamenti factionem*.

S. The Reaſon why a Baſtard cannot make a Teſtament, if he have no lawful Children, is plain: Becauſe he can have no Succeſſion; and his movable Eſtate is therefore caduciary to the King, as his Land-Eſtate would fall to the King as *ultimus Hæres*.

N. If a Father, who is a Baſtard, will ſucceed to his Children? Answer, It is thought, He will.

S. A Father a Baſtard may ſucceed to his Children, as his Children to him; for the Relation is lawful and reciprocal.

Biſhops.

N. If Precepts granted by Biſhops may be execute after their Death? If a Biſhop, being upon the Point to be tranſlated, may accept a Renunciation of a Tack not expired, and grant a new Tack for more Years in Prejudice of his Succeſſor? Or, if he may ſet a Tack?

S. A Precept, of it's own Nature, is but a Mandate, and dies with the Mandator: And tho' Precepts of Saſine be declared by Act of Parliament 1693, not to die with the Granter: Yet Precepts of *Clare* are thence excepted.

A Biſhop may not ſet a Tack, while there is a former Tack ſtanding: Nor is it fair for him to accept of a Renunciation of a ſtanding Tack, that he may have the Benefit of ſetting a new Tack in Prejudice of his

Succeſſor. Yea if a Biſhop during the ſetting of a former Tack, ſet a new Tack and live thereafter in the Benefice until the Iſſi of the former Tack; the new Tack commencing in his Time will ſubſiſt.

Biſhops Debts.

N. SEEING Biſhops are in incorporation, and [illegible] their Predeceſſors Perſon, but only the [illegible]: And therefore are not liable to his Debts: [illegible] to the Debts of the Biſhoprick, as *v. g.* if there be an [illegible] payable out of the ſame to a pious Uſe, and the preceding Biſhop has not payed the ſame: Will his Succeſſors be liable perſonally; at leaſt, will their Rents be affected by a real Action of poinding the Ground, or like to the ſame?

Quid Juris as to the Taxation, If a Biſhop would be liable for theſe Bygones that were due by his Predeceſſor: Reſerving Relief againſt his Heirs and Executors?

S. A Biſhop's Succeſſor in Office is liable to none of his perſonal Debts: But if there be a Penſion affecting the Benefice really, it will affect the Succeſſor; yet, 'tis thought, it ſhould only affect ſince his Entry, but not for Bygones due by his Predeceſſor, which are only a perſonal Debt upon the Predeceſſor; and that in this a *Penſion* differs from an *Infeftment of Annualrent*.

As to the Taxation, the Benefice will be liable for Bygones, and the Succeſſor can only have Relief for the ſame againſt the Heirs or Executors of his Predeceſſor: For the King cannot be wronged as to his Taxation.

Bodomaria.

N. *BODOMARIA eſt Fœnus Nauticum, quo ſub ſpe majoris lucri Pecunia datur Navis Patrono, hoc pacto, ut ſalvâ Nave tantum cum fœnore reddatur, relicto interea Hypothecæ loco navigii fundo, quo perdito, & Capitale interit.* Beſold.

S. It is here well defined to be *Fœnus Nauticum*. But the Reaſon of the Name, and even the Manner of pronouncing and ſounding of it, is ſtill uncertain.

Burghs Liferent Eſcheat.

N. WHAT Execution can be againſt Burghs for their Debt? If they may be charged with Horning; and if thereupon any Liferent Eſcheat may follow?

S. On a Charge of Horning againſt a Burgh, the ſingle Eſcheat can only follow, but no Liferent; for Burghs die not.

Captions.

N. [redacted]F Captions may be execute after Sun-sett; seeing Pounding cannot be then executed? It appears there is Difference betwixt Pounding and Caption, by Reason other Persons that may have Interest in the Goods may be concerned in the Pounding, which is not in Captions. And the King's Rebels may be taken at any Time; and there is no Time so fit to take and surprise them, as the Night.

S. That Captions against Rebels may be execute after Sun-sett, and under Cloud of Night, hath no Doubt; tho' the Privy-Council hath sometimes in Captions for Civil Debts, judged otherwise.

Casualities of Superiority.

N. IN General, *it is thought*, That all Casualities, which are *Fructus Dominii directi*, are to be considered as *fructus pendentes* of Lands, which pertain to the singular Successor; unless they be *Collecti*: And they are never thought to be *Collecti*, unless they be at least claimed and pursued for.

S. Casualities of Superiority, tho' vaking; yet if not actually claimed, do transmit to the singular Successor, unless reserved: But if either actually claimed before, or reserved, may, it seems, be insisted for by the Predecessor to whom they vake: Yet it might be thought, that the simple claiming, or raising of a Pursuit, should signify little, unless there were also an express Reservation.

Cautioner and Relief.

N. IF a Cautioner be denounced for his Cautionry, will the Principal be liable to relieve him of the Loss of his Escheat? *Ratio dubitandi*, the Principal is obliged to relieve him of what he should pay for him, but not of the Prejudice he should sustain for his Contumacy and Rebellion through his not Payment.

S. A Cautioner may crave all Cost, Skaith, and Damage that happens to him directly by his Cautionry: But if he be denounced and escheated for not paying, it is his own Fault who performed not the Obligation of his Cautionry.

Chaplainrie.

N. LANDS being holden of a Chaplain, a Bishop being Patron, if there be not a Chaplain, and the Bishop delay or refuse to present,

ſent, what Courſe ſhall be taken by the Vaſſal's Heir, or ſingular Succeſſor to get Infeftment, if the Biſhop may not be purſued, and the Director of the Chancery, to hear and ſee him decerned to preſent a Chaplain, and to exhibite to one of the Clerks of Seſſion the Preſentation to be regiſtrate, to the effect it may be known and patent to the Lieges, and that within ... Days after he be charged: And incaſe of Diſobedience, verified by a Horning againſt him upon the Decreet; the Director of the Chancery to direct Precepts for infefting of the Vaſſal.

SEEING by Act of Parliament anent the Superiority of Chaplainries, and ſuch like, The Patron to the Chaplain is appointed to be Superior to the Chaplain's Vaſſals: *Quæritur*, If Chaplains hold of the Biſhops, the Biſhop will be Superior? ANSWER, It is thought, not; ſeeing the ſaid Act of Parliament is only in Favours of Laick Patrons, and was made when the Biſhops were ſuppreſſed.

S. CHAPLAINRIES whereof Biſhops Patrons, are now fallen to the Crown, and the Patrons of all ſuch Chaplainries are declar'd to be Superiors to the Lands holden thereof.

Charge to enter Heir.

N. AN appearand Heir being charged to enter Heir in General, and renouncing; *Quæritur*, If there may be a Compriſing or Adjudication againſt him, unleſs he be charged to enter Heir in Special? *Ratio Dubitandi*, That *fruſtra* ſhould he be charged to enter Heir having already renounced: Yet *it is thought* he ought to be charged, ſeeing a Special Charge to enter Heir, is *Inſtar*, and in Place of a Special Service and Infeftment thereupon: And the Heir may repent that he renounced, and may be better adviſed, when he is charged to enter Heir in Special.

S. AN appearand Heir charged to enter Heir in General, and renouncing, Adjudication proceeds without a new Charge to enter Heir in Special. And it is is only a ſuperfluous Caution that hath occaſioned ſome to judge, that notwithſtanding of the firſt Renunciation, the appearand Heir renouncing ſhould be charged again to enter Heir in Special, and ſo be put to renounce twice, in lieu as it were of a ſpecial Service which is but a Fancy.

Chattels Real.

N. LIFERENTS, Non-entries, Ward, and ſuch like Caſualities, that are ſucceſſive when they are gifted, they become real Chattels, and will fall to the Executors of the Donatar, as is thought: *Quæritur*, If when they are not gifted they ſhould be conſidered alſo as Chattels, ſo as to belong to the Executors of the Superior, and not to his Heirs and Succeſſors of the Land?

S. THIS Title is not in our Stile, but Liferents, Non-entries, Ward and ſuch Caſualities, if not gifted, do certainly tranſmit to the Superior's Heir and not to his Executors. And even tho'

the Liferent or Non-entry were declared, then nothing would fall to the Superior's Executors, but if a Marriage were declared and liquidate, the Avail Liquidate would fall to his Executors: And ſuppoſe the ſaid Caſualities to be gifted; yet it's thought that Liferents and Non-Entries before *Declarator*, ſhould fall to the Donatar's Hand, as being a Right to be declared and having a Tract of Time. But for a Gift of Marriage wherein the *Declarator* is principally the Liquidation, it is thought that whether *before* or *after*, it ſhould fall to the Donatar's Executors.

Children and Creditors.

N. IF a Father grant Bonds to his Children, and thereafter contract Debt, ſo that he is not in a Condition to ſatisfie both his Creditors and Children, Whether the granting of Bonds for onerous Cauſes will import a Revocation of the Childrens Proviſion: At leaſt, will the *poſterior* Creditors be privileged and preferable to the Children?

S. BONDS of Proviſion, if delivered to the Children, or any for them, make the Children Creditors: But before Delivery, a prior Creditor to the Delivery ſhould be preferred ſimply: And yet the Queſtion may remain, If a Bond of Proviſion and a Creditor came in Competition; which ſhould be preferred? For albeit a Bond of Proviſion delivered, be a Ground of Debt, and ſhould be preferred according to the Diligence uſed; yet if this Bond and an onerous Creditor came to compete for the ſame Subject on equal Diligence, as by Adjudication, it may be thought, That the Creditor is more favourable; ſpecially if the Bond of Proviſion be ſtill in the Bairns own Perſon unaſſigned; but if aſſigned for an onerous Cauſe, the Aſſigny is as favourable as the Creditor.

Childrens Proviſions.

N. A Father having diſponed to his Son of the firſt Marriage, the Fee of his Eſtate; with Power to burden it with 40000 Merks for Proviſion of his remanent Children allenerly: *Quæritur*, If he being then married upon a Woman of that Age, that he could not have Children by her, ſhould thereafter marry; May he provide any Part of that Sum to the Children he had thereafter of the laſt Marriage? Or, if the remanent Children, in whoſe Favours the Faculty is reſerved, can only be underſtood of the remanent Children of the firſt Marriage, he having then Five beſides the Heir? Mr. *Alexander Gibſon* contra *his Brother*.

S. IF this *Reſervation* was made in Favours of the *then* remaining Children *allenarly*, or with any other *Note of Reſtriction*; there ſeems to be no Place for an Extention: But if it was only in Favours of his remaining Children; 'tis thought the Father may extend the ſame, even to ſuch as may after exiſt of another Marriage: For this appears to be the Meaning of Parties.

Civitas.

N. *CIVITATES & Municipia intelliguntur nomine Reipublicæ: & eis competit beneficium Legis.* leg. 3. cod. de jure Reipub. Sc. *Rem-*

Respublica ut pupillus [illegible] Friſchius Tom. 3. exercit. juris publici, exercit. 21. n. 17, & ſequen.

Præſcriptio non currit minoris ſed Civitati, Ibid. 35.

Propter tenuitatem civitas veniæ beneficio imponit, Ibid. 37.

Gandet Præſcriptionis centenariæ.

Emptio pacto ſine traditione, quibuſdam caſibus habet in rem actionem, Ibid.

Uſus-fructus ut relictus durat centum annis, Ibid.

5. These *Latine* Remarks are only Citations: But it is not thought with us, that a Burgh Royal may claim the Benefit of a *Pupil* and *Minor*; but that it is enough, that the Magiſtrates for the Time be liable for their mal-Adminiſtration.

Clauſes in Contracts of Marriage.

N. THE Contract of Marriage betwixt *Alexander Sandilands*, and *Agnes Sandilands* his Wife, Daughter to *Robert Sandilands* Dean of Gild, beareth that Proviſion, *viz.* That the ſaid *Robert* and his foreſaids are obliged to the ſaid *Agnes* and her Spouſe, that at *Robert* his Deceaſe the ſaid *Agnes* his Daughter ſhall be eſteemed a Bairn of the Houſe and Family; and ſhall ſucceed to her Part and Portion natural equally with the Remanent of *Robert*'s Bairns to all Sums, Pleniſhing, Goods and Gear; and others that ſhould pertain to the ſaid *Robert* the Time of his Deceaſe.

The ſaid *Alexander* is obliged and his foreſaids, that whatever Benefit ſhall fall to the ſaid *Agnes*, or her to ſucceed to by her Father's Deceaſe, or by Vertue of the ſaid Obligement, to provide the ſame after he ſhould get it, to himſelf and her in Conjunct-fee and Liferent, and to the Bairns betwixt them, which failzieing his Heirs and Aſſignies, 9 *January* 1657. Regiſtrate 1 *March* 1671.

The ſaid *Alexander* is obliged to provide the Conqueſt to himſelf in Liferent; and their Bairns in Fee.

The Contract of Marriage betwixt *John Hamilton* Writer, and *Rachel Sandilands* the other Daughter of the ſaid *Robert*, bears, That they accept the Tocher in Satisfaction of all other Sums, Executory, Debts, Goods, and Gear, and others whatſoever which was provided to the ſaid *Rachel*, or which may fall or pertain to her, or may be claimed by her by Deceaſe of the ſaid *Robert*, or her Mother *Mauſe Weir*: All which ſhe and her Husband aſſigns to the ſaid *Robert*, his Heirs, Executors, or Aſſignies to be diſponed at their Pleaſure.

By the Clauſe of Conqueſt the ſaid *John* is obliged to provide the ſame to himſelf in Liferent, and the Bairns in Fee: And to that Effect to inſert the Bairns Names in the Writs.

The ſaid *Rachel*, if her Husband deceaſe before her, is to have (if there be no Children) the Half; and (if there be) the Third of the Pleniſhing of the Houſe the Time of his Deceaſe, which is to be made free of Debts by his Heirs and Executors.

Quæritur, If the Obligement to ſucceed to all that ſhould pertain to the Father ſhould be underſtood, only as to a Bairn's Part, and ſhould not be extended to the Dead's Part?

If what ſhould fall to *Agnes* after her Father's Deceaſe, ſhould belong to the Bairns of the Marriage, tho' the Marriage be diſſolved through the Husband's Deceaſe before the Father *Robert* his Deceaſe?

If *Rachel* the other Daughter, notwithſtanding her Renunciation,

will come in as One of the nearest of Kin, at least as to the Dead's Part, and Dead's Third and the Half of the Bairn's Part?

S. These Two Cases above have nothing material for certainly the Obligement by *Robert Sandilands* in his Daughter *Agnes* her Contract of Marriage, That she should be esteemed a Bairn of the House, and succeed to her Portion natural equally with the rest of *Robert*'s Bairns, should as well give her Right with the rest to the Dead's Part, as to her own Bairn's Part; and the Obligement in the same Contract, that what should fall to the said *Agnes* should belong to the Bairns of the Marriage, did stand good to her Bairns tho' her Marriage was dissolved by her Husband's Decease before her Father *Robert*, for such seems to be the expres Destination.

As to the Case of the other Daughter *Rachel*, who with her Husband's Consent, had accepted of her Tocher in Satisfaction of all, and particularly of what might fall to her by the Decease of *Robert* her Father, or of her Mother: There appears no *Doubt* but that this her Renunciation should exclude her both from Dead's Part and Bairn's Part.

N. By Contract of Marriage, the Husband is obliged in the First Place to provide 30000 *Merks*, to his Wife in Liferent, and the Heirs of the Marriage presently: And to the other Bairns 18000 *Merks* after his Decease: *Quæritur*, The Heir being served, will there be a Confusion as to his Debt and Provision? *2do.* If he may have Action against the Executors for it, as Heir and Creditor? *3tio.* If he succeed to his Father in Land-Estate, though the Money was not employed, will not the Obligement be satisfied, *pro tanto*? *4to.* Will the Bairns come in *pari passu*, or must the Heir be satisfied in the first place out of the movable Estate?

S. The Son serving Heir of Provision, and under Protestation, may evite the Confusion, and have Action against the Executors as Heir of Provision, and so Creditor. And if he succeed to his Father in a Land-Estate, it may satisfy his Provision *pro tanto*, but if there be only a Movable Estate, the Meaning of the Contract appears to be to prefer the Heir to the other Bairns; and yet if the other Bairns cannot find their Provision of 18000 *Merks* otherwise: The Heir of Provision comes then to be liable to them: But it may be thought, that in effect all the Bairns are but Heirs of Provision; and that the Order and Preference *to the Heir of the Marriage*, should prefer him to the other Bairns; unless they were all Daughters; for then they must come in equally.

Coals.

N. A Woman being infeft in Lands in Liferent, *cum Carbonibus & Carbonariis*: *Quæritur*, If she may win Coal where there was none before in order to Selling? *Ratio Dubitandi*, That *usus fructus est jus utendi salva rei substantia*, and the Coal *usu consumitur*; and being digged *non renascitur*: *It is thought* therefore, that where there was no Coal before, the Liferenter cannot break Ground in order to Selling.

Quæritur, If the Liferenters at least may win Coal where there was no going Coal before in order to their own Use and for their Fire, refounding any Damage that may be by breaking of the Ground.

Where there is a Coal-gone: *Quæritur*, If the Liferenter may continue to work and sell? Answer. It is thought, for the Reason foresaid, the Liferenter cannot sell, but may claim by the said Clause to have as much Coal as may serve for the Liferenter's Use only, unless it be expresly provided, That the Liferenter may win and sell as the Fiar might have done.

If the Liferent be not constitute so clearly in the Terms foresaid, and it be only provided, That the Liferenter shall liferent the going Coal: *Quæritur*, If the Liferenter may have the same Benefit of the Coal as the Fiar might have had, both for the Liferenter's Use, and for Selling; providing that the Liferenter use the same as *bonus vir*; and in the same Manner as was in use formerly, and do not any thing of purpose to the Prejudice of the Fiar; putting in too many Coaliers, or otherwise?

As there is *Quasi Usus-fructus* of Money; if it ought to be so of Coal, and what is win should be valued, and the Price should be valued to the Liferenter in Liferent, and in Fee to the Heritor? To consider if this Case has occurred elsewhere in the Case of *Sylvæ cæduæ*.

S. A Woman being infeft in Liferent *cum Carbonibus & Carbonariis*, if the Lands have no going Coal, she may not search for and win them in order to selling: For this would *minuere rei substantiam* where an *Usufruct* is only left: But might she not in this Case search for and win Coal for her own proper Use? And it may be thought that the Clause should import *this*; or otherwise it would be *superfluous*. 'Tis true it would still *minuere rei substantiam*, which differs from the Case of Liferent-Lands having a Wood; for there, tho' there were no yearly Hagg, she might cut for her own Use; and it would not *minuere rei substantiam*. But still, a Clause being so expres ought to operate; and it cannot operate less, than *Coals for proper Use*: Only it seems reasonable, that she should refound any Damage to the Fiar that he suffers by breaking the Ground.

But if there be a *going-Coal*, and the Liferenter be infeft in it for her Liferent, it cannot be doubted but that she may use it as the *Granter* did use the same, even for Sale and Profit: For here the *Coal* is regarded as the very *fructus* of the Ground; only the Liferenter may not exceed the former Use, or put more Hands to Work.

A *Quasi usus-fructus* of Coal is an odd Conceit, and can hardly be understood, unless it were distinctly constitute valuing the Coal as the Stock, and giving the Rent for the *Liferent*: But a *Quasi usus-fructus* in Money is easily understood; because *Money* is fungible, and the *Interest* is it's Profit

Collation.

N. By Contract of Marriage, the Husband is obliged to provide the Heirs of the Marriage therein specified: But there is a Clause subjoined, That if there be only Daughters, and they be moe than One; the Eldest only should succeed, and the other Daughters should resign their Parts in her Favours, reserving to the Father to provide them, which he did not: There being beside some heritable Estate, *Quæritur*, If the Eldest would not only have the Land, but her Share of the other Estate as Heir-Portioner? *Ratio Dubitandi*, That Law and Nature favours and intends Equality, betwixt Children; especially where the Interest and Preservation of Families is not to be considered, and upon

that Account there is no Prerogative of Primogeniture and Maleness, which is only competent *Liberis Masculis*, Daughters being *filii & ex pari familiæ*: And by the Contract, the eldeſt Daughter is not obliged to marry one of the Name, or who ſhould take the Name. 2do. The Heir cannot be Executor unleſs he confer, or upon the forefaid Conſideration; and there appears to be *Eadem Ratio* in this Caſe, *Whitelaw*.

S. That a Husband ſhould oblige himſelf to provide the Heirs of the Marriage, but with a Claule, That if there be only *Daughters*, and more than one, the eldeſt only ſhould ſucceed, and the other Daughters ſhould reſign in her Favours, *reſerving* to the Father to provide them, is an odd Conception of a Contract of Marriage. But if there was a *Land-Eſtate* provided to the Heirs of the Marriage in theſe Terms, it ſeems to be to the Heir male or eldeſt Heir female without Diviſion: But if all the Eſtate was *Money*, it would be hard to make the younger Siſters renounce their Parts; and yet it ſeems to be ſo intended, and ſo much the more if there was a Son of the Marriage. As to what is added, *That the Heir cannot be Executor unleſs he confer*, it ſeems to ſuppoſe, that the Succeſſion to this Eſtate in Money can be only by way of Executry: But if a Contract ſhould bear a certain Sum to be provided by the Husband to the Heir male of the Marriage, or to the eldeſt Heir female without Diviſion. This expreſs Proviſion ſeems to exclude Executry as it doth Executors.

N. If an Heir, to the effect he may ſhare in the Executry offering to confer the Movable Heirſhip, ought not alſo to confer Lands, and other heritable Eſtate? For the Executry may be very conſiderable, and it were very hard upon Collation of the Movable Heirſhip poſſibly of ſmall Value, he ſhould both retain the heritable Eſtate how great ſoever, and ſhare in the Executry though very great

S. If an Heir ſucceeding in a Land-Eſtate and Movable Heirſhip would rather chuſe to have his Share in the Executry, he muſt confer both his Lands and the Movable Heirſhip, that is, his whole Heritage; for the Movable Heirſhip is but a Compliment to the Heir, and the collating of it allenarly, cannot in Reaſon bring the Heir to ſhare with the Executors.

N. If there be Three Daughters, and the Eldeſt at her Marriage get a Part of the Lands: *Queritur*, If ſhe will ſhare as Heir Portioner with the other Siſters, unleſs ſhe confer; as in *England*?

S. The Analogy of our Law ſeems to run, That ſhe ſhould have what was provided to her in her Contract of Marriage intire, as a *Præciputum*. And if ſhe be not excluded by her Contract, that ſhe ſhould come in as Heir Portioner, with her other Siſters, as to the Lands that remain.

Commiſſion by Way of Mandate.

N. IF a Commiſſion may be granted by a Perſon to Friends for ſelling Lands, and to endure irrevocable, not only during his own Lifetime, but after his Deceaſe, to bind his Heirs until it be execute? *Ratio Dubitandi, Mandatum expirat morte*: And on the other Part, there may be a Neceſſity to ſell, and his Heirs may be Minors: Or, upon ſome other Conſiderations, it may be fit that there ſhould be

ſuch

such a Power given; and so they have herein by granting such a Commission, no way tied their Hands, having reserved Power.

S. A Commission by Way of Mandate expires *mandatoris*: But if the Mandate expresly provide otherways, it continues.

Commissioners to the Parliament.

N. Quæritur, IF there be any Case, wherein Commissioners to the Parliament ought to consult the Shires whom they represent? ANSWER, It is thought, That albeit by their Election they have Commission *cum libera Potestate*, it is to be understood that they may *superstruere*, but cannot evert or alter Fundamentals and the Constitution of the Government, either of Church or State: And if any Thing of that Nature be intended, it ought not to be done by Representatives, unless they have special Authority to that Purpose.

S. THIS Question being determined otherways by the Parliament 1706, in the Union of the Two Kingdoms, there is no Place now for any further Reasoning upon it.

Commonties.

N. THE Servitude of Pasture being either in common Moors, as *Gladsmoor*, or such like: Or, in Commonties belonging to Heritors and Superiors, and their Vassals by Rights from them: Or, in Lands belonging to others, and not to their Superiors; *Quæritur*, If an Infeftment *cum communi Pastura*, will be a Ground of Prescription, in all the foresaid Cases, unless it be special as to the Subject, and the Lands to be pastured upon? ANSWER. As to common Moors, if the Lands adjoining be disponed, *cum communi Pastura*, by the King, it is to be presumed, that before they be disponed, the King's Tenants of the Lands disponed were in use to pasture in the said Moor: And therefore the Clause *cum communi pastura*, is to be understood with the Pasture formerly belonging to the King: And in that Case, Possession, tho' not for the Space of forty Years by vertue of that Right, is sufficient. *2do.* There is the same Reason as to Lands disponed by Superiors having a Commonty within their own Property. *v. g.* In *Dirletoun*, unless there be some Speciality. *v. g.* As in *David Ferrest* his Precept of *Clare constat*, there is nine Acres given without Mention of Pasture in the Commonty of *Dirleton*, and there is a Tenement and Three Acres and an half *cum communi Pastura in Communia de* Dirletoun: So that the Right being granted *unico contextu*, the Right of the said Acre *cum communi Pastura*, excludes the same as to the other Nine Acres. *3tio.* As to a Commonty within the Property of other Superiors, the Clause *cum communi Pastura* in the *Tenenda*'s, will not be a Ground of Prescription, unless there be a Right or Constitution by the Heritor, within whose Property the said Commonty is.

S. As to the Servitude of Pasturage in common Moors, whether the Moor belong to the King, or to another Superior; the Superior hath still the Right of Property, and the Vassals only the Right of Commonty: And if the Moor or Common come to be divided, the Superior's Share

is ordinarily judged the Fifth Part. But our late Act of Parliament hath only allowed Commons to be divided that hold of other Superiors; and where the Vaſſals of ſuch Commons are infeft *cum communi Paſtura*, no doubt they may preſcribe the Servitude as well as the Right of Property; and the Clauſe *cum communi Paſtura* will give the Servitude, where the Superior had a Common before, and whereof his Tenents only in the Property had the Benefit.

But where a Charter bears, *cum communi Paſtura*, whether in the *Tenenda*'s; or even in the *diſpoſitive Part*: Yet, it ſeems, it ſhould not give the Servitude upon the Property of another Superior or Heritor; unleſs it were very expreſs in the diſpoſitive Part, and well eſtabliſhed in the Diſponer by a good Right and long Poſſeſſion.

Common Appendant.

Quæritur, THERE being a Servitude of Paſturage or Commonty due to me out of neighbouring Lands (which the *Engliſh* call *Common Appendant*) will the Servitude extinguiſh if I purchaſe the ſaids Lands, ſeeing *res ſua nemini ſervit*? ANSWER. It is thought that it is ſuſpended, but not extinct: So that if the Purchaſer ſell the Lands affected with the Servitude, it will revive; unleſs it be provided otherwiſe: And Servitudes of that Nature are *real*, and Pertinents *Prædiorum non Perſonarum*.

S. IF there be a Servitude of Paſturage due to me out of neighbouring Lands, my purchaſing of theſe Lands, will, no Doubt, extinguiſh the Servitude: And if I ſell the Lands again in the common Stile, that is, *With all Right, Title and Intereſt*, the Servitude will *not revive* unleſs it be ſo provided and expreſly reſerved.

Compenſation.

N. IF there may be a Compenſation on a Bond preſcribed, for that Reaſon, *viz.* That *quæ ſunt temporalia ad agendum*, they are *perpetua ad excipiendum*: And the Ground of Preſcription as to perſonal Actions being *Negligentia petentis*, cannot be pretended in this Caſe, the Defender being ſatisfied in his own Hands.

S. It is thought Compenſation cannot be proponed upon a Bond preſcribed, becauſe by the Act of Parliament it preſcribes as to all Intents: And tho' the Proponer may alledge that he was not negligent, becauſe ſatisfied in his own Hand; yet the Negligence ſtill remains; if Compenſation was not objected; for Compenſation does not take place in Law, unleſs it be objected: And tho' the Proponer may further alledge that he had no Opportunity to object; yet he had Right to purſue for the Debt within the Years of Preſcription.

N. When, in Proceſſes for Sums of Money, Compenſation is proponed, and the Purſuer replies upon Compenſation, and the Defender again duplies upon Recompenſation: *Quæritur*, What Courſe ſhall be taken by the Judge upon their ſeveral Recompenſations? ANSWER, If it appear, that the Purſuer or Charger is addebted in as much to the Defender, as the Defender to him, all the Compenſations being conſidered, the

[illegible] ...ould be
[illegible] ...tion: And
[illegible] ...found Debi-
tor to [illegible] ...And if
the Pursuer [illegible] ...Defender ought to
be effectually [illegible] ...decerned to pay what he is owing.

S. [illegible] ...Money, Compensation is proponed, and the Pursuer replies upon Recompensation, and the Defender again duplies upon Recompensation; the best Course the Judge can take, is, to ordain a Compt and Reckoning, and decern for the Balance.

N. An Assigny to a Debt for an onerous Cause, having pursued for the same: *Quæritur*, If it be alledged, That the Time of the Assignation, the Cedent was the Defender's Debitor, and that he hath present Action for liquidating his Debt: Whether ought Compensation to be sustained upon the said Ground, and a Time granted to liquidate? *It is thought*, That, the Cedent not being inhibit, nor any Diligence done against him, the Sum assigned was *in commercio*, and might be disposed of by him; there being then no Ground of Compensation, which is *de liquido in liquidum*; and otherwise *non tollit obligationem*. *Vide* Retention *in Litera* R.

S. An Assigny for an onerous Cause pursuing for Payment, the Debitor may propon a Compensation upon a Debt due to him by the Cedent the Time of the granting of the Assignation: But if the Debt, the Ground of the Compensation, was not then liquid, the Debitor cannot object it; albeit he should offer to liquidate it *instanter*: For the Cedent could not be bound up from assigning, upon the Ground of a Debt not then liquid, but to be thereafter liquidate against him.

Composition for Entry.

N. If the Superiority be disponed or comprised after Resignation: *Quæritur*, Whether what is payable for receiving of the Vassal should belong to the former Superior: or to his Successor by whom he is to be received, being *pretium* of his Entry?

S. When a Superiority is disponed or adjudged after Resignation, *It is thought*, the Composition for receiving the Vassal should belong to the Successor by whom only the Vassal can be validly received.

Compriser.

N. If after expiring of a Comprising, the Compriser may pursue for Evidents, being Incidents to the Right.

S. After a Comprising is expired, the Compriser may pursue for the Rights and Evidents: But the Expiration must either be first declared, or at least craved to be declared in the Action for Exhibition and Delivery.

N. If a Bond [illegible] Compriſer who had compriſed before, [illegible]

S. The Queſtion reſolves, What ſhould be the *Effect* of a base Decreet of Compriſing, and how long it ſhould burden the Debitor to contract Debt or diſpone? Anſ. certainly, if the Compriſer be negligent, he has himſelf to blame that did not either inhibit or expede his Infeftment, whereby the Debitor might have been totally denuded: But otherwiſe a Creditor or Purchaſer cannot be prejudged by the neglected Compriſing.

As to the Queſtion, How long the Compriſer may delay his Infeftment, and when he may be judged negligent? *It is thought*, that ſeing he had the Remedy of an Inhibition, any Delay he can be charged with, ſhould militate againſt him.

N. If a Compriſer of Ward-Lands die before expiring of the Legal, will the Marriage of the Heir fall? If it fall, will the Debitor, if he redeem, be liable to refound the Avail?

S. The Marriage of an Appriſer's or Adjudger's Heir ſhould not fall until the Adjudication expire: For if the Adjudication come to be ſatisfied within the Legal, then the Adjudger draws only his Debt, and the Caſualities of the Ward vakes by the Debitor; for it were a great Hardſhip that a Creditor adjudging Ward-Lands for his Debt, and thereupon obliged to ſecure himſelf by Infeftment, ſhould by his Deceaſe have his Heirs Marriage to vake, which may be of greater Avail than all his Debt. Nor can it be thought reaſonable, that the Debitor redeeming ſhould make good to him his Damage. But the plain Ground of Law appears to be, That a Creditor is allowed to adjudge as well Ward-Lands as others, only for Payment of his Debt: And that if the Debt be payed before the Legal, he ſhould be diſmiſs'd. And therefore it was of old the Practice of Exchequer, to take an Appriſer entering, bound to renew his Infeftment after expiring of the Legal, as judging that then only he became the King's Vaſſal, and liable to the Caſualities of the Holding,

N. Comprisings of Heritable Bonds, though they be upon the Matter Legal Aſſignations, ſo that the firſt Compriſer will be preferred to the ſecond Intimating, in reſpect of the previous publick Solemnity in deducing Compriſings: Yet Intimation is neceſſary to put the Debitors in the Bonds compriſed, *in mala fide.*

S. Altho' a Compriſing or Adjudication of a Bond needs not be intimate to compleat the Right; yet unleſs it be intimate, the Debitor paying *bona fide* to a poſterior Adjudger, will be acquit. And *'tis thought*, the poſterior Adjudger *qui etiam ſuum recepit*, will ſtill retain, as hath been marked above.

N. If there be a Neceſſity of a Declarator of expiring a Legal, as there is of a Conventional? Seeing in many Caſes there may be much Equity for purging the Expiring; as if the Sum be all paid but a very little Part, and the Lands much exceed the Debt.

N. In

pr[illegible]
to [illegible]

N. If the [illegible] will the Comprising [illegible]

S. Seeing Apprising [illegible] may eafily be extinguished, not only by Infeftment, [illegible] and by any Receipts of Money by the Apprifer from the Debtor; It would feem to follow, That the Adjudger becoming Debtor to him in a liquid Sum within the Legal, that Sum fhould then a Ground of compenfing and extinguishing perpetually, both againft the Adjudger and his Affigny: And whether Infeftment hath followed upon the Adjudication, or not: For, whatever would extinguifh the Debt, muft extinguifh the Adjudication within the Legal in every Cafe. It is true, if the Adjudication were expired, and the Adjudger fhould thereafter become Debtor, it may alter the Cafe; for then, tho' Infeftment had not followed, the Adjudger becomes a Purchafer. But whatever happens within the Legal that may extinguifh the Debt, fhould alfo extinguifh the Adjudication; whether Infeftment had followed upon it or not.

N. The firft Comprifing being reduced at the Inftance of a poſterior Comprifer *ex capite inhibitionis*, Will the firft Comprifer have Right to the Legal of the Second?

Tho' the Debitor be inhibited, May he not aſſign the Legal?

S. It appears, That a Reduction *ex capite inhibitionis*, is but, ay and while the Debt the Ground of the Inhibition, be fatisfied: So that the firft Adjudger fatisfying the Inhibiter, reftores his own Right: And juft fo if the Inhibiter be fatisfied within the Legal of his Adjudication: But if the firft Adjudger fuffer the fecond Adjudication to expire, it will exclude him for ever: For then the Second hath the Benefit of the Expiration; and having reduced the Firft *ex capite inhibitionis*, it can have no more Place.

A Debitor inhibited may not aſſign the Legal remaining in his Perſon, more than any other Right: But that does not hinder the firft Adjudger, after having his Adjudication reduced *ex capite inhibitionis*, to get his Right reftored, by fatisfying the Ground of the Inhibition.

N. If Comprifing, whereupon Infeftment is not to follow, and which formerly needed not to be allowed, ought to be recorded, conform to the Act of Parliament 1661. *Act.* ?

S. By the 31 Act of the Par. 1661, it is ſtatute, That all Comprifings be recorded, for Information of the Leiges: Which ſeems to exclude the Cuſtom formerly in Uſe of *allowing* ſuch Comprifings *only* whereupon Infeftment was to follow, for a Warrand againſt the Superior.

N. There being a Comprifing againſt a Principal and two Cautioners of their reſpective Lands; and the Right of the ſaid Comprifing, being acquired by a Perſon who had bought One of the Cautioners Lands, If that Perſon ſhould diſpone the Right of the other Lands with the Comprifing, Sums, and Grounds thereof, as to the other ſaid Lands, only before the expiring of the Legal: *Quæritur*, 1. If he hath not re-

[illegible] it was *Actum* that the [illegible] Lands in the ſecond Place; and that it ſhould be effectual as to the other Lands in the ſecond Place: And alſo [illegible] to be underſtood to operate according to their Intention.

Queritur 2do, If the Comprifer of that Legal ſhould Redeem, who ſhould have Right to the Lands, whether the Diſponer, or thoſe to whom he has diſponed, as to the other Lands, at leaſt to a Part of the ſame?

ANSWER. If the Diſponer's Intereſt as to the Security of his Lands amounts to, or exceeds the Sum, he will have Right thereto entirely, ſeeing he is to be ſecured in the firſt Place.

S. THIS Caſe ſeems to be ill ſtated, *viz. Before expiring of the Legal.* For, it cannot be thought but that the Comprifer got Payment from the Perſon who bought the Cautioner's Lands, and to whom he diſponed the Comprifing: Nor is it eaſy to conceive how any Comprifer can diſpone and communicate the Compriſing within the Legal, without aſſigning to the Debt the Ground of the Appriſing, either for leſs or for more: So that within the Legal an Apprifer may indeed renounce ſome Part of the Lands apprifed, leſs or more as he thinks fit; but he can never communicate the Appriſing without aſſigning the Debt the Ground thereof, and ſo leſſening his own Security. And if the Legal of this Compriſing ſhould be compriſed, and Redemption follow upon it, the Aſſigny would certainly be preferred to the Sum.

N. IF a Comprifer infeft in Lands doth conſent only to a Right made by the Debitor of a Part of the Lands compriſed, will that Conſent ſecure the Buyer againſt the ſingular Succeſſors of the Comprifer, having Right from him by Compriſing or Diſpoſition and Infeftment thereupon: Seeing they may pretend that a Conſent doth not denude *habili modo.*

S. THIS Conſent within the *Legal* will have the Force of a *Renunciation*, and after the Legal it will be of the Nature of a Diſpoſition: But if the Comprifer was infeft before conſenting, and ſhould afterwards be denuded, *It is thought*, the *Conſent* would not militate againſt the ſingular Succeſſor: Becauſe a *Conſent* in this Caſe is not *habilis modus*, and hath no Record; yet it would ſignify more *before* than after expiring of the Legal.

N. A Creditor compriſed the Principal Debitor's Lands, and ſome Time thereafter the Cautioner's Eſtate; and after the Compriſing againſt the Principal was expired (but yet the Compriſing againſt the Cautioners was running) he diſpoſed of ſome of the Principal's Lands: *Quæritur*, If the Cautioner may plead that the Compriſing againſt him is extinct, in ſwa far as the Creditor has an irredeemable Right to the Principal's Eſtate, exceeding his Debt: And is ſatisfied, at leaſt may be ſatisfied with his Intromiſſion, and diſpoſing of the ſame?

S.

A Compriser [illegible] Debitor's Estate exceeding [illegible] with a disponing of a Part of the [illegible] comprise any other Estate belonging to the Debitor, [illegible] that he is not satisfied? Or if the Expiring of the Comprising and the making use thereof thereafter, putteth him in the same Condition as if the Lands had been disponed to him irredeemably, and *data* and *accepta de futuro*: So that both Principal and Cautioner, against whom a Comprising is yet running, may pretend that the Debt is satisfied, at the least that the Creditor should denude himself of that Comprising *cum onere suo*? *Lawerence* contra Mr. *John Fairholme*.

S. If a Creditor first comprise the Lands of his principal Debitor, and thereafter those of his Cautioner; And when the Comprising against the Principal is expired, should dispose of the Lands therein contained, the Cautioner may justly plead that he should be relieved to the Value of the Principal's Lands, just as if the Principal's moveable Goods were poynded; he would be relieved to their Value. And in effect, when a Compriser dispones Lands after Expiration of the Legal, he may be thought to have accepted of the Lands for his Debt; unless he protest in the contrary; So that he must at least allow to the Cautioner in this Case, the Value of the Principal's Lands.

And thus, if a Compriser of Lands to, or above the Value of his Debt, should, after expiring of the Legal, go on to comprise other Lands belonging to the Debitor, as if the Debt were not satisfied, he might certainly be obliged to count for the Value of the Lands formerly apprised and expired; or at least, to denude himself thereof, and assign that first Comprising; specially if he were going on to apprize a Cautioner's Lands. It is true, if a Creditor should comprise Lands of a far greater Value than his Debt; yet if he rest satisfied with his expired Apprising, he cannot be made accountable for the Over-value: But if he rest not satisfied, but go on to apprise more, he should at least be accountable for the Value of the Lands first apprised; For otherwise he might apprise his Debitor's Lands *in infinitum*: Yet if he apprise never so many Lands within the Legal, the same will hold: And the Expiring of the Legal, will give him the irredeemable Right.

N. A Compriser of Lands holden Ward, being infeft: *Quæritur*, If these Lands will ward by the Decease of the Compriser; and if the Marriage of the appearand Heir will fall? *Ratio Dubitandi*, A Compriser is but an *interim*-Vassal for Security of his Debt: And upon that Consideration such a Right in *England* is considered as a *Chattel*.

If the Comprising be redeemed, will the Debitor be liable to refound the Damage sustained by the Ward and Marriage?

Quæritur, If the Ward of the Compriser's Heir will determine and expire upon the Redemption?

S. It is already answered, That neither Ward nor Marriage should fall, unless the Comprising expire; And if it expire not, but be satisfied within the Legal, then the Casualities will fall by the Death of the Debitor: Yet as to the Ward of the Lands apprised, it may be thought, the Superior should not want a Vassal, nor his Service: And that the Ward vakes by the Appriser's Death: And that this may be imputed to the Debitor, who should therefore relieve the Compriser of his Damage; since the Debitor did occasion it. But *on the other Hand*, it may be

thought, That such a Law allows Creditors to comprise even Ward-Lands, and thus the Superior gets a Vassal for his Entry, the Superior should expect no other Casuality by the Comprifer, unless the Comprising expire. For, if it be satisfied within the Legal, he should only expect his Casualities by the Debitor his old Vassal. But if the Ward of the Comprifer's Heir should fall within the Legal, no Doubt it would expire upon the Redemption.

N. Quid juris in that Case of proper Wadsets, if the Debitor after Redemption will be liable to refound the foresaid Damage? The Difference being, that a Comprising is an involuntar Right, and the Wadset voluntar; so that the Creditor seemeth to take his Hazard.

S. In a Comprising the Creditor is *necessitate* to comprise; and the Law obliges the Superior to enter him; and the Superior has his Reward for it: So that here, all is *involuntary*, but for the Benefit of Commerce, and by Force of Law. And therefore it is still thought no Casuality should vake by a Comprifer entered by the Superior, tho' in Ward-Lands, before expiring of the Legal. But in a proper Wadset all is *voluntary*: The Wadsetter gives his Money for such a Security, and should know the Nature of the Holding; and the Superior receives him as his Vassal: So that *'tis thought* the Wadsetter of Ward-Lands doth in this Case take his Hazard of the Casualities that may vake by him, as he does of the Fruits; and that the Granter of the Wadset paying the Sum in the Reversion, can be no farther liable for the Damage of the Wadsetter's Casualities; specially since the Wadsetter has a Remedy, by providing in a Clause of *Requisition*, that he may require his Money when he will: But after Redemption the Wadsetter's Ward would still cease: And the Granter of the Wadset comes to be again Vassal; and of old was re-entred by a Letter of Regress.

N. If Lands be comprised from a Person who has no Right thereto for the Time, but acquires thereafter a Right, whether the said *jus superveniens* will accresce?

S. If the Debitor had neither Right nor Colour of Right to the Lands appriſed; it may be thought this Comprising is *inanis*; and that a second Comprising, led after the Debitor acquires a true Right, should be preferred: But if the Debitor had any Right or Ground of Right the Time of the first Comprising, After-acquisitions may be thought to accresce.

N. If there be a Difference betwixt a Comprifer and a Buyer from an interposed Person, who has acquired a fraudulent Right, *viz.* That a Buyer acquires a Right for an onerous Cause, and it is just and the Interest of Commerce, that he should not be prejudged; whereas a Comprifer does only Diligence upon his own Hazard, and the Right *transit cum sua causa & labe*?

S. By the Act of Parliament 1621, a Right in Defraud of Creditors may be reduced: But if he who purchased, tho' in Defraud, should again dispone for an onerous Cause, the Receiver of this Disposition would be safe: But *it is thought*, a Comprifer from this Purchaser would not have the same Immunity: For he comprises or adjudges out of Necessity, and must take his Debitor's Right as it is: Whereas the Interest of Commerce doth favour the second honest Appriſer. But of this afterwards.

N. A

N. A Right being acquired from a Perſon not inhibited, after Compriſing and before the Compriſer; *Quæritur*, Whether he of the Compriſing or the Acquirer ſhould be preferred? Which appears to be hard, ſeeing a Compriſing is only *jus ad rem* and a legal Diſpoſition: And the firſt complete Right by Infeftment ſeems to be preferable. And a Compriſing does not import *vitium litigioſi*, ſeeing the Debitor's Right is without Queſtion; and the Queſtion is, Whether the Compriſer or the Receiver of the Diſpoſition ſhould have Right to that which is unqueſtionable in it ſelf?

S. A Right being acquired from a Perſon not inhibit; but compriſed from; and the Acquirer infeft before the Compriſer, our Author thinks it hard, that the Lords ſhould have preferred the Compriſing: But it has certainly happened, becauſe the Compriſing was *retenit*. For, if the Denouncing of Lands *to be* appriſed will hinder the Debitor to diſpone in Prejudice of a recent Denunciation; *multo magis* a Compriſing ſhould hinder to diſpone to the Prejudice of a recent Compriſer. And therefore as hath been ſaid above, ſince there is no Time prefixed in this Matter, the Compriſer's *Delay*, or *Diligence*, ſhould be the Rule.

N. The Debitor, or theſe who have Right to the Legal, redeeming from the appearand Heir of the Compriſer; whether doth the Redemption ſiſt the Courſe of the Ward and Marriage if the Heir be not fourteen Years of Age? Answer, *Affirmative; quia reſoluto jure principali reſolvuntur conſequentia.*

S. This ſuppoſeth, *That the Caſualities fall by the Compriſer's Death within the Legal*, which, *'tis thought*, ſhould not be allowed; albeit our Pratique hath inclined that Way: For ſeeing a Compriſer compriſes out of Neceſſity for Payment of his Debt, and the Law allows him to do ſo; and alſo gives to the Superior a Years Rent for his Entry: It ſeems unreaſonable that the Compriſer ſhould be farther troubled within the Legal. Indeed if the Legal expire, then he is no more conſidered as a Creditor, but as a Purchaſer: But otherwiſe, if he be redeemed within the Legal, the Debitor returns to be Vaſſal, and the Caſualities ſhould only vake by him.

N. Will not the Debitor be liable not only to pay the Debt, but to refound the Prejudice the Creditor's Heir ſuſtains upon Occaſion of the falling of the Caſuality of Ward and Marriage by the Deceaſe of the Debitor? Answer, *Affirmative*, and the Creditor and his Heirs ſhould be *indemnes*: It being the Debitor's Fault that they are forced to compriſe, and that the Compriſing is not redeemed.

S. This *Queſtion* is not clearly ſtated: For, if the Ward and Marriage be alledged to fall by the Death of the Creditor within the Legal, *'tis thought* they fall not. And if they ſhould fall, it would be unreaſonable to make the Debitor to incur the Prejudice thereof; and much leſs ſhould the Creditor. But if the Caſualities fall by the Deceaſe of the Debitor, they cannot effect the Creditor or his Heir, who muſt ſtill be *indemnis*: But the plain Iſſue is, If the Debitor redeem within the Legal, the Caſualities will take Place: And if he redeem not, and the Creditor become Proprietar and Vaſſal, the Caſualities will only fall by him, and after the Expiration.

S. A Diſcharge to any Payment of Money by an Appriſer within the Legal, extinguiſhes the Comprifing, and that from the Parity of the Act of Parliament: Which allows all Intromiſſions within the Legal to extinguiſh: For in effect during the Legal any Manner of Payment extinguiſhes a Comprifing; whether Infeftment have *followed* upon it *or not.*

N. A Comprifing being redeemed, whether doth the Debitor's Right and Infeftment revive, or muſt there be a new Saſine, and what way ſhall the Debitor be releaſed? *Anna.* There muſt be a new Saſine; And the ſame Way is to be taken as in the Caſe of a Regreſs: Seeing the Compriſer, as he has a legal Reverſion, ſo there is a legal Regreſs.

S. A Comprifing being redeemed, the Debitor's Right doth revive, either by a Renunciation duly regiſtrate, or a Declarator of Redemption: But to imagine that the Debitor muſt have a new Saſine in this Caſe, is without Ground; nor is there any Regreſs, or known Method in Law, to obtain it.

N. Quæritur, If a Comprifing as to all Effects be equivalent to a Reſignation? *Ratio Dubitandi,* That a Comprifing is not only a legal Diſpoſition, but the Compriſer may be immediately infeft upon the ſame, as upon a Reſignation, though the Debitor deceaſe.

S. A Comprifing *is* a legal Diſpoſition, and the Compriſer may be thereon infeft, tho' the Debitor be dead; But a Reſignation is alſo a Diſpoſition; and the Receiver thereof may now, by the Act of Parliament 1693, be infeft thereon, tho' the Diſponer and Reſigner be dead.

N. If a Compriſer get a Right to the Legal of his own Comprifing, before it expire by another Appriſing: And ſo *Deinceps* if there be more Comprifings whereof the firſt Appriſer obtains Right within the reſpective Legals: *Quæritur,* When the ſame do expire? *Cogitandum.*

S. If a Compriſer get a Right to the Legal of his own Appriſing before it expire by acquiring the ſecond Appriſing thereof, and ſo *Deinceps* it may be thought he acquires Right to his own Legal to ſecure himſelf againſt the Expiring. And if the firſt Expire, altho' there may be a *Legal* of the *Legal* thereof; yet it can ſignify nothing where the Legal of the firſt is expired: And therefore *in this Caſe,* whoever hath Right to redeem, ſhould redeem within the Legal of the firſt; and if he have no Right immediately to the Legal, becauſe of the Compriſer's acquiring the ſecond Comprifing thereof, he ſhould redeem the *Second* and alſo the *Firſt*; but all within the *Legal* of the Firſt.

N. If a Royal Burgh, or others having Power to receive Vaſſals upon Reſignation, has Power likewiſe to receive upon Comprifings: And if in that Caſe any Compoſition be due to them?

S. Any Superior having Power to receive Vaſſals upon Reſignations may alſo receive them upon Comprifing; and a Burgh *ſuperior in the*

Caſe

Case may do the same, and claim the Composition; and *he thought* will also have the Benefit of the *Retract*, which the Act of Parliament gives to the Superior against the Compriser, by offering to pay the Debt.

N. If the Lands be comprised, how shall the Duties be divided? Answer, If any Part of the Lands be sown before the Comprising, the Increase will belong to the Compriser: And if the Lands be set, the Time of the Comprising is to be considered: For, if the Comprising be before *Whitsunday*, the Compriser will have Right to the whole Duties; and if it be before *Martinmass*, he will have Right to the Half: And if after *Martinmass* to no Part thereof.

S. If the Debitor possess naturally, the Compriser will have Right to the Increase of the Lands, sown before Comprising; so that here, *Messis sementem non sequetur*, because of the interveening Comprising: But if the Lands be in Tenendry before the Comprising, the legal Terms of *Whitsunday* and *Martinmass* must regulate the Duties, as above.

N. The Superior being charged with Horning to receive a Compriser, and being denounced, will he be liable for Damage and Interest; if either he infeft a second Compriser, or a Precept be direct out of the Chancery for infefting of him?

S. A Charge by a *Compriser* to the *Superior* is equiparate by the Act of Parliament 1661, to the Compriser's being infeft; for that Act declares the first effectual Appriising to be either, in respect of Infeftment following thereupon, or, the first *exact Diligence* for obtaining the same: And this *exact Diligence* is said to be, *a Charge of Horning duly given.* Whence it follows, that the Superior neither needs to suspend, nor is liable in Damage; and that the Compriser hath as little Need to discuss the Suspension, and is in as little Hazard of Damage: Yet it may be necessary, that a Compriser should push his Diligence, by discussing a Suspension, or, denouncing, and thereon obtaining himself infeft in the ordinary Course, incase his Appriising should expire. For, in that Event, he cannot have a compleat Right for Transmission until he be infeft; nor can he at any Time remove Tenents, until he be infeft.

N. If upon the Redemption of a Comprising, the Superior will be obliged to Infeft the Redeemer, *gratis?*
Quid Juris, If the Redeemer be another Creditor?

S. Upon Redemption of a Comprising, the Debitor, *as is already said,* returns to his Right either upon Renunciation or Declarator of Extinction, and needs not any new Sasine upon it. But if the Redeemer be a second Compriser, then he must also pay a Composition, if not already infeft; but if already infeft, he hath no more to pay, but to get a Renunciation.

N. Quæritur, If Comprisings be equivalent to Dispositions and Resignation following upon the same, so that the first Compriser is preferable to others even before Infeftment? Answer, That Comprisings are only legal Dispositions, and do not denude the Debitor without Infeftment; whereas Resignation, being made in the Superior's Hands, and accepted, doth denude.

S. Comprisings are Legal Diligences: And Preferences are referred according to the Infeftment following on them, to the Comprisings; saving the *Special*, That upon a Comprising, Charge to the Superior is sufficient: And, tho' Resignation in the Superior's Hands be not accepted, may denude: Yet it is certain, that if upon a *second* Resignation the *first Infeftment* be taken, that *second*, will be preferred.

N. What is the Reason then, That after Comprising, it is found that the Debitor not inhibited cannot dispone in Prejudice of the Comprifer? Answer, That the Law, and the Judge, who is *Lex animata*, having *in subsidium* disponed to the Creditor the Debitor's Lands; the same is so affected by the legal Diligence, that the Debitor is denuded as to that Effect, that he can do no voluntary Deed to prejudge the Creditor; without Prejudice nevertheless of more exact and complete Diligence of other Creditors, who obtaining Infeftment will be preferred to the first Comprifer: As in the Case of Moveables after Arrestment, the Debitor cannot dispone the same; and yet may be evicted by another Creditor by way of Poinding.

S. The Debitor after Comprising cannot indeed *dispone* if the Comprifer be not *in mora*: But if the Comprifer be *in mora*, as hath been said, it will not have the Effect of an Inhibition to hinder a posterior Disposition and Infeftment upon it, to be preferred. But still in the Concourse of two Comprisings, the *second*, if first infeft, will be preferred, without enquiring whether the first was *in mora* or not.

N. If a Superior be content to take a Right to a Comprising of Lands holden of him, not being willing to enter the Comprifer: *Quæritur*, If he may claim a Year's Duty when the Lands are redeemed? Answer, *Negative*: And he is in the same Case as if he had comprised himself; so that as he cannot in that Case, neither in the other, can he claim any Composition; in respect the samen is granted only that the Superior should not be prejudged by obtruding a Vassal, upon him against his Will.

S. If a Superior, not willing to enter the Comprifer, should pay the Debt, and take a Right to it himself; the Debitor redeeming will not be obliged to pay him a Year's Duty: For that is only given by Law to the Superior, when he is forced to *change* his Vassal.

N. If, by the *First Act of Parliament* anent Comprisings, a Composition was due to the King? Answer, It is thought, not: There being a Difference betwixt the King and other Superiors; in respect the King is *Pater Patriæ*, and all the Lieges being his Subjects, it cannot be said that he has any Prejudice by the Change of his Vassal: And long after the said Act of Parliament, Signatures were not past upon Comprisings, but Comprisings lay at the Signet, and were the Warrant of Charters under the Great Seal.

To try when that Custom was changed, and what Warrant was for changing the same.

S. When the Exchequer do pass Signatures upon Comprisings, they may take the known *Composition*, which is *Ten Merks of the Thousand*, whatever the former Custom was: Nor doth it indeed appear, *when* or *how* it was changed; but 'tis like, it hath been done by *a Rule of Exchequer*.

N. A Perſon having granted Bond that he being ſatisfied of the Sums due to another Perſon, and that one [illegible] relieved of his Cautionry for the Debitor; the Compriſer ſhould reduce himſelf in Favours of the Debitor: And the ſaid Compriſer, having thereafter diſponed the Right of the Compriſing, but with the Reſtrict of the ſaid Backbond expreſly provided in the Diſpoſition and the Precratory of Relignation therein: *Quæritur*, If there be no Mention in the Saſine that the Right is with the ſaid Burden, Whether the Compriſer will be ſtill liable by the ſaid Backbond by the Perſons in whoſe Favours it is conceived? And 2*do*. If the ſaid Backbond will militate againſt a ſingular Succeſſor acquiring a Right from the Aſſignie to the Compriſing? ANSWER, It is thought both the Compriſer and the Perſon having Right from him with the Burden of the Backbond, will be liable, 2*do*. A ſingular Succeſſor will not be liable, unleſs the ſaid Proviſion, That the Right ſhould be with the Burden of the Backbond, be *in Tenore* and in the Saſine.

S. BACKBONDS granted by Compriſers are commonly eſteemed *Real*: And 'tis thought, that even in the Caſe proponed of a Bond to the Debitor innovating as it were the legal Reverſion, a ſingular Succeſſor will be liable to the Backbond, tho' it be not mentioned in his Saſine. But the Import of Backbonds is to be underſtood of ſuch as are given at the leading of the Appriſing, or at leaſt before Expiration of the Legal: For, after Expiration of the Legal, ſpecially in the Caſe of Infeftment, a Backbond ſhould not militate againſt a ſingular Succeſſor.

N. Quæritur, WHAT Way ſhall the Appearand Heir have the Right of the Lands compriſed, where the Compriſing is extinguiſhed by Intromiſſion, if it be not by a Service as Heir to his Father? ANSWER, He may give in a Bill to the Lords, or intent Action againſt the Superior on that Ground, That the Lands are in effect redeemed and ſatisfied by Intromiſſion; and that the Superior and Creditor being conveened, it ought to be declared, that the Lands are redeemed, and the Creditor ought to renounce, and the Superior be decerned to infeft.

S. AN apparent Heir of a Debitor from whom Lands are compriſed, and the Compriſing extinguiſhed by Intromiſſions, may ſerve and infeft as Heir, and then *declare*: For, Inqueſts do not ſtop to ſerve Heirs *in Special*, unleſs Oppoſition were made on an expired Appriſing; and hardly then: But if the Inqueſt *ſhould* ſtop, the apparent Heir, on a General Service may *declare*.

N. WHEN a Perſon is denuded by Infeftment, and yet the Infeftment and Diſpoſition whereupon it proceeds, is reducible upon the Act of Parliament, as being *in Fraudem Creditoris*: *Quæritur*, What Courſe the Creditor ſhall take, and whether he ſhould firſt reduce before he compriſe? *Ratio Dubitandi*, That if he compriſe, the Debitor being diveſted as ſaid is, there is nothing in his Perſon to be compriſed. ANSWER, It is thought, it is fitter to reduce, and then to compriſe; becauſe, after the Creditor has been at the Charges of Compriſing, there may be Difficulty in the Reduction: And yet upon other Conſiderations, it may be fitter firſt to compriſe; in reſpect the Lands may be compriſed, both for the Debt of the Diſponer, and the Debt of the Perſon to whom the Right is given.

S. The Lords of Session have refused of late to reduce *ex capite Inhibitionis*, unless the Inhibiter [illegible] lest the Decreet should be *in pendenti*. But formerly the Inhibiter first reduced (as our Author here advises) to make sure Work; lest when he had been at the Pains to comprise, he should fail in his Reduction, and lose his Expences. However, 'tis certain, that in either Case, the Creditor, or, the Inhibiter, may comprise first, if they will. For, the Suggestion, That there is then *Nothing in the Debitor's Person to be comprised*, is of no Value; there being a *Ground* for the *Reduction* that may after ensue.

Infeftments upon Comprising.

N. WHEN there is a Clause in a Charter upon Comprising, That if the Comprising expire, another Infeftment should be taken within Year and Day, otherwise the Infeftment to be void: *Quæritur*, What is the Effect of that Provision, if it may be purged? *2do.* If another Comprifer may object the said Nullity?

S. This appears only to be the Superior's Interest: And the Superior ordinarily doth not object it; because, he holds the first Infeftment on the expired Comprising, to be sufficient to fix his Vassal.

Conditio.

N. *CONDITIO est adjectio, quâ id quod dari, aut fieri volumus, confertur in aliquem casum & suspendit obligationem.*

Conditione impossibili adjecta, Contractus est nullius momenti, & contrahentes ludere videntur: secus in sponsalibus & ultimis voluntatibus in quibus favore Matrimonii & ultimæ Voluntatis, tales Conditiones habentur pro non scriptis. Christen. de Sponsalibus, quæst. 14

S. Conditio is here well defined to be, *Adjectio, qua id quod dari aut fieri volumus, confertur in aliquem casum*, and it's said, *suspendere Obligationem.* But Debates upon Conditions are very many, as *1mo*, Whether, a Condition; or, only a *Modus*, or, other Quality. *2do.* Of what Kind the Condition is. *3tio.* If it suspend the *Obligation*, or, only the *Performance.* And they well deserve to be considered.

It is here said, That *Conditione impossibili adjecta Contractui aut Obligationi*, it renders them null: And that, *adjecta sponsalibus, & ultimis viluntatibus, habetur pro non adjecta.* But it may be thought, That such a Condition *in sponsalibus* should most of all argue, *Contrahentes ludere, & nihil serio agere*; and therefore make them void, *modo res sit integra.*

Confessions of Criminals.

N. IF a Confession be emitted and signed before the Judge in the Criminal-Court, may the Pannel retract, and not adhere to it it before the Assyse, so that the Inquest cannot proceed on it as Evidence and clear Probation?

Minors having confessed heinous Crimes, may they desire to be reponed upon Pretence of their Age, tho they do not pretend and clear that their Confession was upon Error or Mistake?

S. The Confession of a Criminal must be emitted before the Assize in Judgment; or otherwise is not probative: And tho' it be emitted before the Judge; yet it may be retracted before the Assize.

A *Minor* is both *doli capax* and punishable for Crimes, even *pœna ordinaria*, after sixteen Years of Age: And therefore his Confession in Judgment before the Assize, should also be probative against him.

Confirmation.

N. A Feu of Church-Lands being neither confirmed by the Pope nor King, If the Confirmation by the King, of Rights granted thereafter by the Feuer to be holden of the King, will supply the Want of Confirmation of the Original Charter?

S. There is a *General*, That all Feus of Kirk-lands should be confirmed by the King: But' tho a Feu of Kirk-lands be neither confirmed by Pope nor King; yet, *'tis thought* the Confirmation of a Right granted by the Feuer to be holden of the King would supply the Want: For this Confirmation is but a *Formality*.

N. When a Person is infeft to be holden of the Superior, and deceaseth; and both the Disponer and Superior that was for the Time are deceased, yet the Superiority is convey'd to a singular Successor: *Queritur*, If after long Time the singular Successor in the Right of the Superiority may confirm the said Infestment: So that the Heir of the Person infeft, tho' not confirmed in his own Time, may be infeft as Heir to him by a publick Infeftment? *Ratio Dubitandi*, It cannot be said that his Father was infeft by a publick Infeftment. To consider therefore whether the Party infeft, being infeft to be holden of the Superior, may be said to be truly infeft holden of the Superior; but that the Infeftment was not a complete Right, until the Superior's Consent and Confirmation was had, whereby it did convalesce, as if it had been from the Beginning: Or if there be no mid Impediment? And there is a Difference betwixt *vitiosum ab initio, & incompletum; illud nunquam confirmatur, istud accedente complemento convalescit.*

S. If a Person be infeft to be holden of the Superior, and so decease; tho' both the Disponer and the Superior for the Time be also deceased, and the Superiority conveyed to a singular Successor; yet this Successor may confirm the said Infeftment: So that the Heir of the Person infeft may serve to him as lawfully infeft: Albeit *ab initio* he was not: For here, there is no *mid Impediment* to hinder the Confirmation to be retracted.

N. If a Disposition be granted to be holden of the Superior containing a Precept of Sasine, and if it be confirmed by the Superior, but before Sasine follow thereupon, the Superior is denuded of his Right in Favours of his singular Successor: *Queritur*, If thereafter Sasine may be taken on the said Precept? *Ratio Dubitandi*, That *Res devenit in alium*

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[illegible] the Superior, after granting of a Charter of Refignation, but before Saſine upon it, ſhould annailzie the Superiority; it might alſo be queſtioned, *If Saſine could be taken on the foreſaid Charter?* And 'tis like the ſingular Succeſſor in the Superiority would contend that he was firſt infeft: Yet, ſeeing here there is no Competition about the *Superiority*, and that all the Queſtion is about the *Tranſmiſſion of the Property*, which belongs undoubtedly to the Diſponer: It is thought, that in both Caſes Saſine might be lawfully taken; *that is*, both on the Charter confirmed; and alſo on the Charter of Reſignation; notwithſtanding of the Superior's being denuded.

N. Quæritur, If Infeftments being to be holden of a Superior, may be confirmed after the Death of the Perſon infeft? *Ratio Dubitandi*, *Craig* ſeemeth not to be clear, upon that Ground, that the Superior and Vaſſal ſhould both conſent; ſo that the Conſent of the Vaſſal in taking the Infeftment, and the Superior's in confirming the ſame, be conjoined, which cannot be, the Death of either interveening: It is thought nevertheleſs, that ſuch Rights may be confirmed after the Death of the Receiver; though their Conſents cannot be conjoined, which was only done, and when the Conſent of Perſons is required *ad integrandam Perſonam*; as in the Caſe of Pupils and Minors, it ought to be given befor their Deceaſe, *& in ipſo actu*. But where the Conſent and Confirmation of Perſons is *ad integrandum & conſtituendum Jus*, which is conſtitute and perfected *per gradus & partes*; the Conſent and Confirmation may be at any Time *re integrâ*, and where there is no *medium impedimentum*: As *Exempli Cauſâ*, If there be a Compriſing againſt the Diſponer, the Diſpoſition cannot be confirmed.

Item, Sometimes there muſt be Confirmation, neither *ad integrandam Perſonam*, nor *Conſtitutionem Juris*, but for confirming the Right conſtitute; as the Pope's Confirmation in the Right of Church-Lands, or the Patron's Confirmation; which are neceſſary in regard of their Intereſts, *Et ne quid Detrimenti Eccleſia capiat*: Which may be at any Time.

If a Right be confirmed after the Death of the Receiver of the Right, and after the Diſponer's Heir is infeft upon the Retour: *Quæritur*, If the Heir of the Perſon who receives the Right, may be ſerved Heir to his Predeceſſor as having died laſt veſt and ſeaſed, notwithſtanding that the Right was null the Time of his Deceaſe; and that there is *medium impedimentum* in the Retour, by the Infeftment of the Diſponer's Heir? Answer, It is thought, he may be ſerved Heir, and the ſaid Infeftment is not an Impediment; the Heirs of the Diſponer being *eadem perſona*, and in effect his Author: And the ſaid Infeftment is in effect to the Uſe and Behoof of the Receiver of the Right and his Heirs: And the Heir of the Diſponer is in no other Caſe than the Diſponer himſelf, whoſe Infeftment is to the Uſe of the Buyer until his Right be confirmed, and then ceaſes.

S. An Infeftment to be holden of the Superior, may be confirmed after the Death of the Perſon infeft: For this Confirmation being only to complete the Right, may be interpoſed at any Time where there is no *mid Impediment*. Thus a Right being confirmed after the Death of

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the Receiver of the Right, and then the Disponer's Heir is infeft upon the Retour: Yet the Heir of the Person receiving the Right may be *served* to his Predecessor, as being the last vest and seased; and this Infeftment of the Disponer's Heir, he being *eadem persona* with the Disponer, can be no mid Impediment.

N. If the King should confirm the Chartet *à me* granted by *Castlemains* to *Cesnock*. *Queritur*, If in that Case the Vassals will be in any Hazard? *Answer*, It is thought, not; seeing it cannot be said that they were at any Time Vassals to *Cesnock*: And though *fictione Juris* the Confirmation be drawn back, as if *Cesnock* had been infeft immediately after his Right; yet it cannot be drawn back where there is *medium impedimentum*, the Vassals having acquired a Right before, and having never been *Cesnock*'s Vassals, but only to *Castlemains* before the Forfeiture.

S. It should have been added in the Querie, That the Confirmation of *Castlemains*'s Charter to *Cesnock* was after *Cesnock*'s Forfeiture; And it seems, that this Confirmation cannot be drawn back to *Cesnock*'s Right, because of the interveening Forfeiture: And that therefore the Vassal should remain Vassal to *Castlemains*, which would save him from the Prejudice of *Cesnock*'s Forfeiture. But a Forfeiture can never be thought a *mid Impediment* in Prejudice of the King; but will rather be understood to imply a Confirmation. And therefore our Author would save the Vassals, on the Account that they had acquired a Right from *Castlemains* before; and were never *Cesnock*'s *Vassals*. But then the Case must be, That *Castlemains* had disponed Lands to be holden of himself; and thereafter disponed the *Superiority* to *Cesnock* by a *Charter a mè*: After which *Cesnock* was forfeited. And in this Case it seems, that the Forfeiture should be equivalent to a Confirmation, and not a *mid Impediment* why the Confirmation may not be drawn back. And thus the Vassals were indeed *Cesnock*'s Vassals. But the Author seems tender to extend the Rigour of a Forfeiture: And they were not *Cesnock*'s Vassals before his Forfeiture, which is the *principal* Point.

N. If an Heritor of Land dispone his Land to be holden of the Superior, and the Superior confirm the Disposition with all that shall follow upon it; but before Sasine be taken upon the Precept, the Disponer dies: *Quæritur*, What way the Purchaser shall be infeft? Answer, The Disponer's Heir is to be infeft, and to grant a Precept relating to the former Disposition and Confirmation: Or if he will not, or think not fit to be Heir; the Lands may be adjudged from him as charged to enter Heir.

Quæritur, In the Case foresaid, if the Superior, after he has confirmed the Disposition, die before Sasine thereupon; Whether a singular Successor in the Right of Superiority may question the said Infeftment? *Ratio Dubitandi*, That there is *medium impedimentum*, *viz.* The Superior is changed; and the former Vassal being his Vassal the Time of his Right, thereafter another Person cannot be his Vassal without his Consent: & *è contra*, the former Superior having done all that he could do to perfect the said Right; and nothing resting to compleat it but the Deed of the Disponer or his Heir by giving infeftment, the former Superior was denuded as to his Interest: So that his Successor cannot question the said Right, being perfected by the Infeftment.

If at least the Successor of the Superiority may be urged to renew the Confirmation? *Ratio Dubitandi*, The singular Successor in the Superiority, may be urged to grant Infeftment upon Resignation in the Hands

of his Predecessor. But if appears there is a Difference, seeing by Resignation the Property is in the Superior's Hands; whereas by the Confirmation, it is not: And the Vassal is not denuded before Infeftment upon the Charter confirmed; whereas he is denuded by Resignation, and by Comprising, which in Law is equivalent to a Resignation accepted; seeing the Superior cannot refuse to give Infeftment upon Comprisings.

S. By the Act of Parliament 1693, Procuratories of Resignation and Precepts of Sasine continue in full Force, as well *after* as *before* the Death of the Granters: And if the Superior, after confirming, should die before Sasine; the Sasine may still proceed, and the singular Successor in the Superiority cannot question the Purchaser's Infeftment. But this Part of the Case is already considered.

It is farder moved, If the Successor in the Superiority may be urged to *renew* the Confirmation? But this appears to be needless, the Right on the former Confirmation being compleated by Sasine. But the Author affirms, That in the Case of Resignation, where the Resignation is accepted by the Superior, his singular Successor may be compelled to compleat it. At least, he says, That by the Resignation accepted, the Vassal is denuded: Which he is not by the granting of a Charter *à me*, until it be confirmed: But Resignation, tho' accepted, doth not denude; and a second Resignation, obtaining the first Infeftment, will be preferred. For these Resignations, being *in favorem*, the Right is understood to remain radically in the Resigner, until Infeftment follow upon the Resignation; just as in the Case of Charters *à me* to be confirmed.

N. If the Disponer be denuded of the Superiority, what Course is to be taken against his singular Successor for renewing the Procuratory? Answer, Seeing in the Case in Question, the Buyer was infeft according to the Tenor of the said Disposition; it is to be considered, if the King may notwithstanding confirm the said base Right.

S. When a Man dispones by double Infeftments, and the Purchaser is infeft base: Tho' the Disponer die before Resignation made on the Procuratory; yet the Procuratory dies not, but continues in full Force by the Act 1693. And so it's needless to look after another Remedy.

Confiscation.

N. If a Person, being at the Horn, dwell within a Regality, and have Goods or Debts within another Regality; Will these also belong to the Lord of Regality where he dwelleth, upon that Pretence, that *sequuntur personam?*

S. The Escheat of a Person dwelling within a Regality, will extend to all his Moveables, even without the Regality, *nam sequuntur personam:* And there appears no Reason to doubt it.

Confusione tollitur Obligatio.

N. By Contract of Marriage, the Husband is obliged to employ 30000 Merks to himself and his Wife in Conjunctfie, and the Heirs

Hairs of the Marriage [illegible] are his Heirs and Executors to employ at his Decease [illegible] to his Bairns before the Heir Executors; if the Heritable Estate be short [illegible] May the Heir pursue the Executor [illegible] *Ratio Dubitandi*; He is served Heir, and *eadem persona* with the Defunct, & *confusione tollitur obligatio*. It is thought he may, and that *Maxim* militateth when the Heir succeedeth *in universum jus & patrimonium*: But in this Case, the Heir having Right only to the immoveable Estate, there is no Confusion of that Obligement which is prestable out of the Executory, to which the Heir has no Right: As in the Case of moveable Debts due by the Defunct to his Heir either of Line or Tailzie, there is no Confusion for the Reason foresaid.

Item Quæritur, If there be not so much in the Executry as may satisfy the Provision foresaid in Favours of the Bairns, If they may have Recourse against the Heir for their Provisions? *Ratio Dubitandi*, The Heir by the Contract was to be provided presently, and the Bairns, at or after the Father's Decease; and by and attour the Sum provided to the Heir: So that the Heir should have his Provision as *Præcipuum*, and before the Bairns. Answer, It is thought, That the Heir being provided under the Name of Heir, which is *Nomen Repræsentationis*, as he is liable to other Creditors, so he is liable to the Bairns, being provided under the Notion of Bairns, who do not represent.

If the said Provisions had been in a second Contract of Marriage, the Son of the first Marriage being Heir of Line, would be liable to the Son of the second Marriage, tho' served Heir; and there would be no Confusion for the Reason foresaid.

§. This same Case is set down above under the Head of *Clauses in Contracts of Marriage*. But, if the heritable Estate fall short of 30000 Merks; the Heir, since he is here *Heir of Provision*, may, as such, state himself Creditor for this 30000 Merks, and so recover it out of the whole Estate falling either to the Executors or to the Heir of Line. But then comes the *Question*, How the 15000 Merks, obliged to be payed to the Bairns beside the Heir, shall be payed, if the Estate fall short? And, If the Heir of Provision getting his 30000 Merks, shall yet *eo nomine* be liable to the other Bairns, if they cannot be payed out of the Executry? For this would be to prefer the other Bairns for their *Fifteen* Thousand Merks, to the Heir of Provision in the *Thirty*: Tho' it be the evident Meaning of the Contract, That he should have his Provision as his *Præcipuum* preferable to the Bairns. *And therefore*, since the Meaning of Parties should regulate such Contracts; if there is a Son of the Marriage, he is certainly Heir of the Marriage *in Contradistinction* from the other Children, and should have his 30000 Merks, whether out of the Executry or out of Lands, *preferable* to the other Children; and they should only have their 15000 Merks, if there be so much remaining of the half Estate heritable and moveable. But, if all the Children be *Daughters*; then they are *all* Heirs of the Marriage *æquis portionibus*, and must divide the Estate among them: And as they are Creditors as Heirs of Provision in the *Thirty* Thousand Merks, so they are Debitors to themselves in the *Fifteen*, provided to the other Children. But the Cause of Mistake in such Cases is often; that we consider the Condition of the Estate as to *Heritable* and *Moveable*, and the Rules thereof, *more* than the *Meaning of Parties*: Whereas the Notions of Heritable and Moveable should be made to accommodate to the *Intention* of Parties, which is the principal Thing.

If these Provisions had been in a second Contract of Marriage, the Son of the first Marriage, Heir of Line, would be liable to the Sons of the second, tho' served Heir, and no Confusion. And just in the same Manner, the Son of the Marriage in Question, tho' served Heir, is yet Creditor as Heir of Provision; and the whole Estate liable to his Payment in the first Place.

Conjunct-Fiar.

N. Quæritur, IF a Lady Conjunct-Fiar or Liferenter of a Barony may receive Vassals singular Successors upon Resignation or Confirmation, or give *Novo damus*.

S. A Lady Conjunct-Fiar is now thought no better than a naked Liferenter, and so cannot receive Vassals; far less give a *Novo damus*.

Conquest.

N. A Father being obliged to provide to the Heirs of the first Marriage the Conquest, and having acquired a Room during the first Marriage, and disponed the same to the Son of the third Marriage: *Quæritur,* If the Heir of the first Marriage may reduce that Right, as given without an onerous Cause in his Prejudice, being a Creditor by that Clause of his Mother's Contract of Marriage? *Ratio Dubitandi,* It is pretended not to be free Conquest, the Father having contracted Debt thereafter above the Sum of that Room: Whereunto it was answered, That the said Room was Conquest, the Price being then paid; and the Debt contracted thereafter.

S. The Heir of the first Marriage may reduce this Disposition made to the Son of the third Marriage, on the foresaid Obligement of Conquest, if the Subject disponed was *clear* Conquest, all Debts deducted at the dissolving of the first Marriage: Yet an Obligement of Conquest doth not hinder the Father to provide rationally, out of it, for the Children of an after-Marriage.

N. A Merchant being obliged to provide the Conquest during the Marriage to himself and Wife, and the Bairns of the Marriage: *Quæritur* 1. Whether Conquest, being *Universitas*, will fall under the Executry of the Bairns, tho' the Subject and what will fall under the Conquest, be moveable?

2*do.* The Conquest being provided so, that the Right should be taken to the Husband and Wife, and Bairns of the Marriage, whilk failzieing, the Half to the Husband's Heirs, and the Half to the Wife's Heirs: Whether the Husband be Fiar, and the Bairns only Heirs of Provision; tho' the Subject be moveable?

Though the Husband be Fiar, If he can dispone the Conquest without an onerous Cause; Or provide the same to other Heirs, in Prejudice of Bairns being Creditors by such Provisions?

The Husband being obliged in these Terms to provide the Conquest, *viz. Lands, Heritages, and Annualrents and other Things*; and to take the *Rights* in Manner foresaid: *Quæritur,* If the General *other Things* be comprehensive of Moveables, there being no Mention of Sums of Money

or

or Moveables? And it ſeems that Conqueſt is to be underſtood properly of heritable Intereſts, of which only, and not of Moveables, Rights are taken: And *vther Things* may be underſtood of Things Homogeneous, and of the ſame Nature that the Things expreſſed in particular are of; (*viz.* Heritable) as Reverſions, Tacks, &c.

If at leaſt Bonds bearing Annualrent, tho' moveable, will fall under the Conqueſt; ſeeing Rights are in uſe to be taken thereof: And by the Law they belonged to Heirs before the Statute?

S. A Merchant, by his Contract, being obliged to provide the Conqueſt to himſelf and Wife, and to the Bairns of the Marriage; the Conqueſt appears to fall to the Bairns equally among them; whether it be Heritable or Moveable. But as to the *Queſtion*, If this Conqueſt will fall under the Executry of the Bairns? It is to be conſidered, whether at the Father's Death the Bairns were all on Life, or ſome of them dead, having left Children: And if theſe Children come to ſucceed with the Bairns alive; tho' the Subject be moveable. And *'tis thought* that theſe Children, tho' remoter, and tho' there be no Repreſentation in Moveables; yet will ſucceed as Bairns with the other Bairns, by Vertue of the Deſtination. But ſuppoſe the only Bairn of the Marriage be dead before the Father, leaving a Son and younger Children; will the Conqueſt in th's Caſe, ſuppoſe in Moveables, fall to the Bairn's Heir or Executors? And it may be thought it ſhould ſtill fall equally amongſt the Grandchildren as Bairns of the Marriage, tho' remoter. But if the Conqueſt once take Effect in the Perſon of the Bairns of the Marriage, it then alters the Nature and Succeſſion of it.

If the Conqueſt be provided to the Husband and Wife, and Bairns of the Marriage; which failzieing, the one Half to the Husband's Heirs, and the other to the Wife's: The *Husband* is Fiar; but limited after the Caſe exiſts: So that he cannot diſpone the Conqueſt in Preju- Prejudice of the Heirs of Conqueſt, without an onerous Cauſe: For the Bairns, Heirs of Proviſion in this Caſe, are Creditors. But ſtill, an Obligement of Conqueſt in a *prior* Contract of Marriage, hinders not a Man, out of the ſame Conqueſt, to provide rationally for the Wife and Children of a *ſecond* Marriage, as the Lords have ſeveral Times found. Nor does an Obligement of Conqueſt to the Bairns or Heirs of the Marriage (for they are *pares termini*) hinder the Father in his own Time to divide the Conqueſt among the Children at his own Arbitriment: And this the Lords have alſo found.

And, where a Husband is obliged to provide the Conqueſt, *viz.* Lands, Heritages, Annualrents, and other Things; it may be thought, that *other Things* extends to both heritable and moveable; ſpecially conſidering the Perſons Contracters, if only Merchants or monied Perſons. But *other Things* being equally improper for deſigning Heritables as well as Moveables, there appears no Reaſon to reſtrain it; ſpecially when it is added to Heritables. And ſo the Clauſe would certainly comprehend Bonds bearing Annualrent, tho' now moveable.

N. The ordinary Clauſe of Conqueſt in Favours of Wives, being of *Lands, Heritages, Annualrents: Quæritur*, If Bonds being heritable, becauſe Executors are excluded, will fall under the ſame? Answer, It is thought not; becauſe the Subject is only Lands, Heritages and Annualrents, whereupon there is or may be Infeftment: And Heritages comprehends only Lands, Teinds, and ſuch Rights as are real by Infeftment or otherwiſe, or whereupon Infeftment may follow.

§. If the ordinary Clause of Conquest of *Lands, Heritages* and *Annualrents*, should be thought to include Bonds bearing Annualrent, excluding Executors, becauſe ſuch Bonds are declared to be heritable; it might be farder extended to all Sums bearing Annualrent. And That *Heritages* comprehends only Lands, Teinds, and other Rights whereon Infeftment may follow, appears to be too narrow; for ſuch a Clauſe in a Contract of Marriage ſhould be as amply underſtood as the Words will bear: Yet, commonly ſpeaking of Annualrents, as aboveplaced, we underſtand Annualrents heritable by Infeftment.

Conſenſus.

N. *USU receptum eſt, ut in terrarum aut nominum & jurium alienationibus & Ceſſionibus, præter contrahentes alii interveniant pro intereſſe & conſenſum accommodent & ſubſcribant contractibus & inſtrumentis: Sed quiſnam Conſenſus effectus eſſe debeat, ambigitur. Quibuſdam videtur, conſentientes, contractus quibus conſenſerant haud reprobare nedum ut reſcindantur agere poſſe, juxta tritam juris regulam,* Quod approbo non reprobo. *Alii opinantur cum nihil juris diſponant aut tribuant, conſenſum haud extendi ultra id quod actum aut cogitatum,* viz. *Ut ſi quod jus eo tempore quo conſenſum adhibuerant ſuberat, aut juris umbra, ejus ratione aut prætextu Litem aut Quæſtionem intentare nequeant; ſalvâ tamen libertate commercii, & jura ſi quæ ſunt penes alios quam contrahentes, potiora acquirendi, aut in ea ſuccedendi: Iis ex intervallo & poſtfacto adeptis conſenſum haud obeſſe.*

Cogitandum an ea ſit commoda diſtinctio, conſentientes ſi in alia jura poſtea ſuccedant iis uti poſſe; quæ enim conſentientibus tunc temporis haud competebant, ſed poſtea nec opinantibus forte jus detulit, ea antequam penes eos forent conſenſu a ſe abdicaſſe, nec veriſimile nec credere par eſt: Qui autem juri in alium transferendo conſenſit, ſi ejuſdem rei jus & melius penes alium eſſe compererit & ſponte & operâ ſuâ acquirat, ex eo adverſus eos qui ipſo conſentiente jus alterum quæſierant, agere haud audiendus: Nec enim juri nec bonis moribus conſentaneum eſt, quod approbavit, aliquid moliri aut quærere quo illud poſſet reprobare aut reſcindere, Broomhall *contra* Lady Darſie.

S. The Author, here, treats of the Import of an acceſſory Conſent; and doth well conclude, That if the Conſenter had any Right or Shadow of Right the Time of giving his Conſent, he, in a Manner, renounced it, and could not thereon quarrel the Diſpoſition conſented unto. But, if afterwards he ſhould either acquire or ſucceed to a better Right than what the Diſponer had; his Conſent ſhould not hinder him to proſecute it: Yet, he well ſubjoins, That if a Conſenter to a Diſpoſition ſhould diſcover another to have a better Right than the Diſponer's, he could not *bona fide* acquire it for to quarrel the Diſponer's Diſpoſition. But put the Caſe, That a Perſon having undoubtedly the Right to the Lands diſponed, gives his Conſent to a Diſpoſition thereof granted by another, and thereafter diſpones his Right directly: Whereupon the Receiver of the Diſpoſition is alſo infeft: It would appear, that the Perſon receiving the direct Diſpoſition, ſhould be preferred to the Perſon getting only Right by his Conſent: Becauſe the Conſenter ſtood directly in the Right: And the Conſent given was only acceſſory, and

upon

upon no Record; which at least should militate for the Person who got the Disposition from him: And if he were first infeft, his Preference may be judged unquestionable. And suppose the Receiver of the Disposition from him who had not the Right, but with Consent as said is, should be first infeft: Yet it may still be thought, that a Consent by the Person that had really the Right to another that had it not, was not *habilis modus*.

Consent.

N. Quæritur, IF an appearand Heir consent to a Disposition made *in lecto*, after the Decease of the Granter, may another Heir quarrel the Deed, upon Pretence that the Consenter was not served Heir at any Time? *Ratio Dubitandi*, The Consent of the appearand Heir the Time of the granting the Right, doth so validate the Right, that all Heirs are precluded from questioning it: And there appears to be the same Reason when the Content is supervenient.

If the Consent will import *Behaving?*

S. If an apparent Heir consent to a Disposition made *in lecto*, the Consent so validates the Right, as it cannot be quarrelled by *any* Heir: But if the Consent be interposed after the Death of the Granter, it may well be doubted: Because it doth not satisfy the Law: And therefore it should signify nothing, unless the Consenter be served Heir. And if this Consent after the Death of the Granter were of any Import, it may be judged to be a *Behaviour*: For it is in effect as a Disposition by an apparent Heir. And if the Law of Death-Bed be considered, this will appear the more reasonable; for that Law was well made to prevent imposing on the Disponer's Weakness in Prejudice of his Heir: So that unless the Heir's Consent were obtained to the very Deed, the Time of making thereof, it cannot be thought a due Consent to make an Exception from the Law of Death-Bed.

N. A Person being infeft in an Annualrent to be holden of the Disponer; and in Possession by Payment of the Annualrent, consents to a Disposition of the Lands: *Quæritur*, If that Consent will prejudge a singular Successor in the Annualrent; the Disposition being neither registrate in the Register of Reversions; nor the Sasine upon the Disposition relating to the Consent?

S. It is plain that this Consent has no Record to put a Successor *in mala fide*: For tho' it may be judged equivalent to a Renunciation; yet, unless duly registrate, it can signify nothing: And even tho' the Sasine on the Disposition *relate* to the Annualrenter's Consent; yet this appears not sufficient; since the singular Successor could not be obliged to search for that Sasine. And therefore it may be justly thought, that the Consent of an Annualrenter in this Case, may indeed exclude *him* and *his Heirs*; but should not bar a singular Successor purchasing *bona fide*.

N. If the Consent of a Person having Right by Disposition, whereupon Resignation has followed, will prejudge a singular Successor?

S, This Question needs to be explained; for if the Person having this Disposition and Resignation in his Favours, should come to be infeft;

his Consent would not be *sufficient* to denude him in Prejudice of his singular Successor: But the Question must be, If this Consent would prejudge a singular Successor to the Disponer? And if the Disponer should grant a second Disposition and Assignation, no Doubt the Receiver of the second Disposition first infeft would be preferred: So that it does not appear, how this *bare* Consent should prejudge a singular Successor, nor who this singular Successor should be.

N. In what Cases Consent to a Right will prejudge singular Successors? Answer, It is thought, That where there is no Infeftment, and the Consenter's Right may be transmitted by Assignation, or discharged; such a Consent may prejudge singular Successors; and will amount to an Assignation or Discharge.

If a Consent of a Party, having only Right to a Reversion, will prejudge a singular Successor unless it were registrate?

S. If the Consenter *here* be not infeft, but have only a Right by Disposition, such as may be discharged, or transmitted by Assignation; the Consent will be valid, and prejudge the Consenter's singular Successors. But the Consent of a Person having Right to the Reversion will not prejudge the singular Successor, unless it be registrate in the Register of Reversions.

Anent Consistories; *whereby the Usefulness and Necessity of these Courts is evinced, and Doubts and Prejudices against them, are cleared.*

N. THE Question, Whether a Judicatory be useful and necessary, and therefore to be instituted, if it be not; and continued if it be already erected; or unuseful and therefore to be suppressed; cannot be defined well *à priori*, but from the Nature of the Subject, and Causes which are agitate in the Judicatory: And if the Subject be necessary and favourable; notwithstanding any extrinsical Abuses (which may creep in to the best Judicatories) it may plead for a Reformation; but not a total Suppression.

All Causes are of Necessity to be decided, and Justice is always favourable; But in some Cases (as the Law speaks) *prædominatur favor & publicum interesse*, and such, and only such are the Subject of the Jurisdiction of the Commissaries, as *causæ Matrimoniales & Testamentariæ*, which are in themselves favourable; and the Causes of Orphans and Widows, of miserable Persons, of Persons slandered and defamed, of Ministers and their Readers for their Stipends, in which the Condition of Parties pleadeth for Favour, not in the Point of Decision (which should be impartial, and abstract from all Respects) but in the Way of Procedure, that it be both exact and summar; that those Parties be neither dwanged by a long and expensive Attendance, nor wronged by a precipitant Handling of their Business: Which Qualities seeming incompatible in a Judicial Procedure, concur only when a particular Judicatory is alloted for such Causes: And neither the Throng of their Business can justle them out, neither the Judge can have a Pretext for shifting them.

The Gravity and Difficulty of Matrimonial and Testamentary Causes is so notour, and the favourable Elogies of Law anent these Persons, recom-

commending them by precise [illegible] them, are so obvious [illegible] it is certain, that [illegible] or in the large Volumes of the [illegible] tilty, that the Causes of Marriages and Testaments

It is to be observed from Law and History, that from these Reasons Matrimonial Causes, and *publication & insinuation Testamentorum* (which is with us the Confirmation of Testaments) were neither entrusted to the lowest Sort of Judges, neither to the Judges of great Employments about the Decision of other Civil Actions, to be decided in a summary way, and promiscuously with other Causes, but by a considerate Choice of Judges, singled out for these Causes: It was provided, that neither the Meanness of the Judge, nor the Greatness, nor Multitude of his other Employments, should prejudge Causes of so great Gravity and Importance.

Though the favourable Nature of Consistorial Causes, and the Necessity of a several and peculiar Judicatory for them, be evident for the Reasons and Difficulty foresaid, and from the Pattern of Antiquity, it will appear more clearly from representing the Inconvenients that will follow, if Consistories be suppreſt, and by answering the Objections against these Courts.

The Inconvenients are these. 1. *Omnis innovatio etiam in melius est periculosa*; especially of a Fundamental Law and Policy, which hath ever been alse ancient as any Monument of Law and Policy in this Country; as is evident from the Titles, *De Testam. In quot partes dividantur bona testatoris. De Testibus & Executoribus testamentariis*, and divers others of *Reg. Maj.* 2. Unless there be a Judicatory appointed for these Causes, it cannot be conceived how Defuncts Wills shall be observed, how Minors, Orphans, Widows, Legators and Creditors shall be secured. 3. Whereas it may be conceived (and, as we hear, is urged by some Men, who know not the Nature of Testaments, nor Use of Consistories) That a general Register may be keeped of Testaments, as of Sasines and Hornings, without Necessity of Confirmation? The keeping of such a Register cannot supply the Want of Consistories, if they should be suppreſt; because, albeit a Register could be keeped of Testament Testamentars given up by the Defunct, and presented to be registrate by Executors; the Registration of them cannot be urged, if the Executors be unwilling, or the neareſt of Kin, who is possibly interested by the Nomination of Executors, and leaving of Legacies, to keep up the Testament, except there be a Judicatory for Confirmation of Testaments, and Edicts served, and Intromettors charged to give up Inventar; neither can any Time be limited for Registration of Testaments: And the Certification of Nullity, in case of not Registrations within the Time appointed, should be Injustice; because Testaments are not the Deeds of Parties concerned, *viz.* Executors and Legators, but the Wills of Defuncts, which may be unknown to those who have most Interest; and therefore the not Registration of them cannot be imputed to them as of Sasines and Hornings, which are the Deeds of the Parties themselves, and cannot be unknown to them. 4. When Defuncts have not made Testaments, it cannot be conceived (if there be not a Judicatory for Confirmation of Testaments) how the neareſt of Kin should be decerned and confirmed Executors Dative, how Licences should be given, *quando dubia est hæreditas*, and apparently *damnosa*, and when *hæreditas est caduca*; and neither an Executor is nominate, nor the neareſt of Kin craveth to be confirmed; how the Defunct's Goods should be preserved to Minors and Creditors, if the Procurator-Fiscal be not

[illegible] Executors [illegible] decerned? How shall the insticie Questions be discerned, and Disputes incident in the Confirmation of Testaments be decided, anent the Nullity and Falshood of Testaments, the Competition of the nearest of Kin, with the Executor nominate, of the Executor *ad omissa* with the Executor confirmed? Of the Executor *ad non executa*, with the Executor of the Defunct? Executors anent the Prelation of Creditors, and others of that Nature?

The Confirmation of Testaments, and the Decision of Causes Matrimonial and Testamentary, cannot be devolved upon the Lords of Session without great Prejudice; 1. Because the Lords are already overburdened with great Business, and weighty Causes of Heritages and great Importance; and therefore have been forced to discharge themselves of Actions possessary, of Molestation, *Jam.* 6. *Parl.* 11. *Cap.* 42. 1587. Ratifying a former Act of the saids Lords, whereby these Actions are remitted to other Judges; because the Multitude of Affairs before the Lords empeaches greatly the ordinary Course of Justice: And it is not possible to the Lords to try the Verity so well, (which are the Words of the Act, and Motive of making of it.) 2. The Lords have no Time to hear Parties, and urge earnestly Calling and Dispatch of the Businesses of greatest Consequence; far less can they have Time to urge Parties to confirm Testaments, and to enquire, and take Course anent Defuncts Goods, *ne dissipentur* to the Prejudice of Creditors and Minors; which should be done, and is incumbent to the Commissaries *ex officio*, albeit Parties urge not. 3. The Lords Procedure by reason of Multitude of Business before them, is not peremptor; and Parties, after long and expensive Attendance, having prepared their Business for hearing, cannot be assured to have them called and expede; whereas Process before the Commissars are peremptor, and Summons bear not Continuations, which is necessarily required in favourable Causes, concerning Minors and poor People who cannot attend; but especially in Edicts and Testaments, which cannot bide Delay, least Minors Goods should perish: And are so privileged, that in vacant and feriate Times, they may be, and are ordinarily expede, without Necessity of a Licence. All Questions and Causes, and Probation of Adultery or Impotency, the Disputes whether *frigiditas sit naturâ vel arte, utrum ante matrimonium aut superveniens, utrum maleficium sit solubile an insolubile*, and others of that Nature, cannot be agitate *verecundè*, in so publick and eminent a Judicatory, *primâ instantiâ*.

These Causes much less can be remitted to Sheriffs, and other inferior Judges. 1. By reason of the Gravity and Intricacy of them. 2. The Sheriffs have either their Offices Heritable and Patrimonial, or chosen yearly by his Majesty: The first cannot have their Right of Jurisdictions enlarged to Causes of such Gravity, without a new Grant and Right from his Majesty; and here how little favourable Heritable Offices are, it is constant from Law and Reason, by the *Act* 44. *Ja.* 2. *Parl.* 11. it is ordained, That no Office should be given in Fee and Heritage; (*Skeen de verb. Sign. in Verbo Sheriffs*) Because in Jurisdiction *persona eligitur*, and both Heritable and other Sheriffs are known to be Gentlemen who understand not the Law, nor the Way of Process, and are forced to delegate *pedaneos Judices*; and to depute their Friends and Servants, who have no Knowledge of the Law, and being changed yearly, have no Time to learn the least Formality of Process. 3. She-

riffs-

[illegible] Weight [illegible] stand the Civil and [illegible] be judged by Bishops. The [illegible] Civil and Criminal, is [illegible] by the Statute 1592. *cap.* 116. *in verbo* [illegible] cannot be extended, without great Prejudices to Causes and Actions of a different Nature: Because Removings, Molestations, Ejections, Services, and other Actions competent to be judged by the Sheriffs, are for the most Part Real and possessory, and may be easily decided by the ordinary Law of the Country, and Acts of Parliament: Whereas Testamentary and other Consistorial Causes, are *in Foricibus juris*; and cannot be decided, but by the Civil and Canon Law, not *authoritative*, but according to the Equity of the said Law, which must be known to those who are Judges in these Causes.

THE Prejudices and common Objections against Commissariots, are these. *1mo.* That they are Episcopal Courts. *2do.* That Official Courts are suppress in *England*. *3tio.* Exorbitancy of Quots, and other Abuses are great in these Courts.

THAT the first may be cleared, It is to be considered, That *jura Episcopalia* are of two Sorts. *1mo.* Such as are usurped by Bishops, as intrinsically inherent in the pretended Office of Bishops. *2do.* Such as extrinsically belong to them by the Grant of Princes or otherwise. These of the former Sort (as their usurped Jurisdiction over their Brethren) are extinct with the Office. The last Sort is not to be suppress, if they be useful and necessary. Thus the Temporal Jurisdiction of Bishops was reserved to Baillies of Regalities, conform to the Infeftment to be holden of his Majesty. Thus Episcopal Patronages are not extinct, but are to be disposed upon as the Estates shall think expedient, & *sic de cæteris*. That the Jurisdiction of Commissaries as it is now established is of this Kind; It appears *1mo.* Because it is clear from the Civil and Canon Law; That Consistorial Causes *non pertinebant ad Episcopalem audientiam* in the Times of the greatest Grandeur, and in the most Superstitious Times: And that Church-Men were prohibit to meddle with them, as absurd, and most incompetent to be judged by them. But these Causes were assumed by these Judicatories in the latter Times, upon Pretext that they were pious and favourable, and by the Connivence of Princes. *2do.* The Jurisdiction of Commissaries, as it is now established, was erected by Q. *Mary* in Time of greatest Purity and Reformation, and a Commission granted by her to the Commissaries of *Edinburgh*, *An.* 1563; and is warranted by divers *Acts of Par. viz. Ja.* 6. *P.* 1. *C.* 28. 1567. (The which Year, the Lords of Session made certain Instructions for the Commissaries of *Edinburgh*, and other inferior Commissaries) By another Act of his 7 *Par.* 1581, which is the 26 in the Catalogue of the unprinted Acts, and containeth a Commission for Confirmation of Testaments and placing of Commissaries. By an Act of his 12 *Parl.* 1592 the 25 of his unprinted Acts, entitled, A Ratification of the Commissariot of *Edinburgh*. By the *Act* 179 *of his* 13 *Par.* 1593, ordaining Letters of Horning to be direct upon Decreets of Provosts and Baillies of Burrows as is granted upon Commissaries Precepts. *3tio.* It is most evident from the 6 *Act of his* 20 *Par.* 1609, That the Jurisdiction of Commissaries is a Temporal Jurisdiction, acknowledged by the Act to flow from his Majesty, as well as any other ordinary Jurisdiction, which his Majesty might

[illegible] Observes, in regard of the Vanity [illegible] Commissaries are Civil and Temporal Judges [illegible] respect of Confirmation of Testaments and [illegible] Matrimonial, *de Incestu*, *Malicious & de Maleficio*, Perjuries, and others of that Nature are incompetent to be judged in Sessions, Presbyteries and Assemblies (which are the true Ecclesiastical Courts) and therefore is acknowledged to be merely Civil, because Summons are direct by the Commissaries under the Signet of Office, bearing his Majesty's Name and Arms; the Certification is Civil, Witnesses are summoned under Civil and pecunial Pains, and Letters are directed for compelling them to compear under the Pain of Horning: The Execution of Sentences is Civil, by poinding or comprising for Liquidate Sums; or by a Charge to fulfil what is *in facto*, upon the Commissar's Precept; or by a Charge of Horning upon the Letters; and by intenting Action of Deforcement before the Commissaries or the Lords of Session. But the Officials Jurisdiction was *Episcopale*, Ecclesiastical in both the former Respects, and was continued as it had been in the Popish Church; the Bishop usurping the Jurisdiction that belonged to Sessions, Presbytries and Assemblies; and delegating to their Officials their Jurisdiction, both *Objectivé*, in Causes competent to be judged in Church Judicatories; and *Formaliter* in the Way of Procedure competent only to the Church. By the Canon of the *English* Church, they were Judges *in causa non modo instantiarum sed Correctionis & Disciplinæ*; they had a Superintendance over Ministers, to advert that they should do their Duty in their Charges: Ministers and Church-men are very accusable before them; and being contumacious and not compearing, might be suspended and excommunicate: They were Judges, whether *Crimen* be *notorium & publicum*, or not; and, upon Pretext that it was not publick and scandalous, *poterant mutare pœnitentiam in mulctam pecuniariam*. They usurped sacrilegiously the Power of the Church, and Ecclesiastick Censures; and by the fulminating, at random, Excommunications for small Matters, as small Debts, Vicarage-Teinds, the Official and his Officers Fees, and for Non-compearance in their Courts: And, by their easy Absolution upon small Satisfaction, and for Money, made Excommunication contemptible. For these and other Abuses intrinsical to the Judicatory it self, these Courts have been long ago cried down on these Grounds by divers learned and well affected Men, and lately suppress: But the Instance of their Ruine cannot with Reason be adduced to subvert Consistories, they being altogether different and absolutely Civil in their Institution, Object and Way of Process, and no more Ecclesiastical than the Church Regalities, which had an extrinsical Dependance on Bishops in the Way of Holding.

It is already cleared, That if any Abuses be in these Courts, they are not essential, resulting upon the Nature and Constitution of the Judicatory; but accidental, which may be reformed, without the Subversion of so old and so useful a Judicatory. 2*do*. If Commissaries either be

[illegible]

Quots may [illegible] provided that small Testaments may be [illegible] Causes of great Testaments they be limited, not to [illegible] which the Estates shall think reasonable to be the highest Sum: The Casualty which shall be thought fit to be taken, may be employed (the Commissaries being satisfied of their Fees) to pious Uses.

5. The Author having been long a Commissary, with great Reputation both for Ability and Integrity, endeavours here to maintain the Commissariot-Courts against the Complaints made of them. But these Courts are declared to be one of the great Grievances of the Nation in the Year 1689; and for Relief of which Grievance, we have only the Act of Parliament 1690, anent the Confirmation of Testaments.

Causes matrimonial are certainly of the greatest Import, and do require good and knowing Judges; but the Abuse of the Commissary-Court was, and is mostly in Testaments and Executries: For, under Pretence of having Judges and Officers to take Care of Widows and Orphans, and of the due Transmission of moveable Estates to Creditors and nearest of Kin, the Methods of inventaring and confirming before the Commissars are imposed; which are most expensive and uneasy; and particularly their Management of the *Omissa, male appretiata & non executa*: Which last, occasions many Questions, and marrs even the natural Course of Succession. But *first*, It is a good Law with us, that nothing heritable is testable, and that a Man on Death-bed may do no Deed in Prejudice of his Heir; which restricts Testaments and testamentary Causes to a very narrow Compass: Whereas in the *Roman* Law, all Things were testable; and their Testaments were their greatest Acts and Deeds, and therefore justly made very solemn, with many Cautions. But with us, nothing falls under Testament save a Man's moveable Estate, which we call *Executry*. *2dly*, It appears most reasonable, That whatever a Man appoints concerning his moveable Estate, should be observed according to the old Law, *ut quisque legassit ita jus esto*: And therefore, if a Man, even by a general Assignation, assign all that shall belong to him the Time of his Death, it should hold; and the Assigny accepting, should be liable for all Debts. For in effect, the Burden of Debts should always accompany the *universum Jus*; and, for the most part, it is so provided. And therefore it may be doubted, why our Act of Parliament 1690 sustains *special* Assignations without Necessity of confirming, but not *general*; whereas the general Assignation does transmit the Right in the same Manner, and makes the Assigny more liable: And his making Inventary, signifies nothing save to multiply Expence. For albeit a general Assignation saves not from Confirmation, yet it is not determined what should be the Effect thereof; for, if it be a testamentary Deed, then it goes no further than the Dead's Part, and will not prejudge either the Bairns or the Relict; but then the Bairns and Relict have the same Re-

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too heavy. And
cording to the Civil Law, and as was also for some time
us, before the Year 1695. But [illegible] we want to have cleared, What
is Heritable, and what is Moveable, What the Right of Succession
impores in Moveables, and, If moveable Debts may and how they
should be tailzied; as likewise, How Moveables should transmit: For in
the moveable Succession we allow no Representation: But then this Suc-
cession in Moveables will not transmit, except they be *executa*: Which
seems to fail in the Dead's Part that transmits by Confirmation *tanquam*
additione: And we farder make a groundless Distinction, as if the Le-
gitime did transmit otherwise than the Dead's Part doth. But these
Things will come to be more fully noticed in the Head of Executors.

Consolidation.

N. A Person having Right by Assignation to a Comprising of Lands holden of himself, whether *eo ipso* that he has the foresaid Right, will the Property consolidate with the Superiority? Seeing a Comprising is equivalent to a Disposition and Resignation thereupon: And the Superior having Right by an Assignation to a Disposition whereupon there is Resignation, and to the said Resignation; *It seems* that in that Case there is Consolidation: In Respect the Superior upon such an Assignation in Favours of a Stranger will be obliged to infeft him: And because he cannot infeft himself, the Law doth introduce Consolidation. *Ratio Dubitandi* is, That Consolidation is upon the Matter a Sasine of the Property: And a Sasine being *facti*, cannot be without some Deed of the Person, in whose Favours the Consolidation is to be made, Declaring that he accepts a Right to the Effect foresaid. If it be not fit in such Cases, that the Superior should before a Notar and Witnesses declare, That, seeing he has both a Right to the Property and Superiority in his Person, it is his will and Intention, that the Property should be consolidate with the Superiority; and that an Instrument upon his Declaration foresaid should be equivalent as if the Compriser had been infeft, and had resigned *ad remanentiam*: And if such an Instrument should not be registrate as an Instrument of Resignation *ad Remanentiam*.

S. When a Superior acquires Right by Assignation, to a Comprising of Lands holden of himself, it seems to be the same Case as if he himself had comprised his Vassal's Property. And if a Superior get Right by Assignation, to a Disposition whereupon a Resignation hath been made in his Hands; and so the said Resignation: It seems to be the same as if the Resignation had been made in his Hands *ad remanentiam*. But the Author desiderates in these Cases a Deed and Instrument upon the Consolidation,

thereby

N. W[illegible] is infeft in the [illegible] tion of both Rights? *Item.* [illegible] of the Property? *Quæritur*, [illegible] ſo that *dominium directum* [illegible] not infeft himſelf; and by his purchaſing of the Property he enters to the Right thereof, and ſo the Property is conſolidate *ipſi cum jure*, in the ſame Manner as if he had been infeft.

If, *vice verſâ*, the Proprietar acquire the Superiority, If *e converſo* there be a Conſolidation of both Rights? Answer, It is thought, Not: And that *dominium utile* cannot draw to it *directum*, without Infeftment by the Superior of the *dominium directum*.

S. When a Vaſſal acquires, and is infeft in the Superiority, the Property ſeems to be ſwallowed up in a Conſolidation. And ſo if the Superior ſucceed as Heir to his Vaſſal in the Property, his Service will bear, That the Lands did hold of himſelf: And tho' it may ſeem that he cannot decently infeft himſelf: Yet 'tis thought he may. And however, there ſhould be ſome publick Deed on Record to make the Conſolidation appear.

If, *vice verſâ*, the Proprietar acquire the Superiority, this muſt be a ſubaltern Superiority, holden at leaſt of the Crown: And ſo the Proprietar's Acquiſition cannot give him a complete Right, until he be infeft in the Superiority acquired. Whereas in the former Caſe, where the Superior acquires the Property, the Right is thereby conſolidate and complete; tho' it need a publick Act and Record. And this appears to be the truer Reaſon than that of *dominium utile non trahit directum*; tho' *dominium directum trahit ad ſe utile*; which is rather the Thing itſelf than the Reaſon of it.

N. If a Perſon, being infeft by his Father upon a Right granted to him and his Heirs whatſomever to be holden of the Diſponer; be thereafter infeft as Heir to his Father in the Superiority of the ſaid Lands, which belonged to his Father and his Heirs Male: *Quæritur*, Whether there will be a Confuſion and Conſolidation of the Property and Superiority? *It is anſwered*, During his Lifetime there will be a Kind of Conſolidation, ſeeing he cannot be Superior to himſelf: But it will ceaſe by his Death, ſo that the Superiority will belong to his Heirs Male, and the Property to his Heirs whatſomever.

If he intends that there ſhould be a Conſolidation, What Courſe is to be taken to that Purpoſe? Answer, If, as in the Caſe foreſaid, he was infeft firſt in the Property and then in the Superiority, he muſt diſpone the Property to a Confident: And the Confident being infeft muſt reſign *ad Remanentiam*, to the Effect the Property may be conſolidate with the Superiority to him and his Heirs Male and their Succeſſors.

S. It is here ſaid, That a Man being infeft by his Father, upon a Diſpoſition made to him and his Heirs whatſomever, to be holden of the Diſponer; and being thereafter infeft as Heir to his Father in the Superiority of the ſaids Lands which belonged to his Father and his Heirs Male; there will be a Confuſion and Conſolidation during his Life: But if he die, leaving only Daughters, That the Superiority will belong to his Heirs Male, and the Property to his Heirs whatſomever. But is it not more reaſonable to judge, That

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Confident to be [illegible] of himself, when he refigns the Property *ad perpetuam*, it brings it but just back where it was; unless it be meaned that he should resign back *ad perpetuam* to the Disponer and his Heirs Male. How full this is thought needless; and that the Son's Infeftment by Service will be the prevailing Right, and transmit the Lands to the Heirs Male.

N. If a Superior should succeed in the Right of Property; *Quæritur*, If there be a Confusion of both Rights in his Person? Answer, It is thought, tho' they may appear to be a Consolidation during his Lifetime, they are nevertheless distinct; seeing the Right of the Superiority may be to Heirs Male, and the Property to Heirs whatsomever: And the said Heirs may succeed *respective*.

If the said Superior, being infeft in the Right of the Superiority, succeed thereafter in the Right of the Property, What Way shall he be infeft therein, seeing he cannot infeft himself? Answer, *It is thought* that it is not inconsistent, that the Superior may give Precept to give Sasine to an Actorney in his Name and for his Use.

If the said Superior intend that the Property should be consolidate with the Superiority, What Way shall it be done? Answer, He may direct the said Precept in these Terms for infefting him: And seeing he has both Rights in his Person, and intends that the Property should be consolidate with the Superiority; the Precept may be in these Terms, to give Sasine, to the Effect the Property may be consolidate with the Superiority; to be holden both of his Superior in all Time coming, in the same Manner as if they had never been severed.

If a Precept may not be obtained *in subsidium* out of the Chancery, for infefting the said Person in the Property to be holden of himself, seeing he cannot infeft himself? Answer, It is thought that a Course may be taken upon a Bill to the Lords, ordaining the Director to the Chancery to direct a Precept upon the Reason foresaid.

S. The Question is here renewed, If a Superior should succeed in the Right of the Property, and the Right of the Superiority be to Heirs Male, and the Right of the Property to Heirs whatsomever. But still 'tis thought, That in this Case the Right of Property would be absorbed by the Superiority, and the Succession fall accordingly, without separating. Aud here, if the Superior succeed in the Right of Property, the Author thinks, as is above noted, That he may infeft himself: And so indeed he may, by directing his Precept in these Terms, to the Effect the Property may be consolidate with the Superiority: And *eo ipso* the Succession will be regulate according to the Infeftment of Superiority. As for the obtaining of a Precept in this Case out of the Chancery, *in subsidium*, by a Bill to the Lords that he might be infeft in the Property to be holden of himself, it appears to be superfluous.

Decreets

N. A Decreet [illegible] ned, because, [illegible] being *sub pupillari tutela*: [illegible] crave the Benefit of her Decreet? *Ratio Dubitandi* [illegible] that it is found that the Decreet againſt him was unjuſt upon the Matter: And it cannot be juſt as to her, and unjuſt as to him.

THIS Queſtion may occur in many Caſes, as that of Two Heirs Portioners, one being Major and another Minor: And after the Decreet againſt both, the Minor being reponed and prevailing: And of a Decreet againſt a Principal, having propoued a Defence of Payment, and having ſuccumbed in Probation: And thereafter the Cautioner being purſued, and upon Probation of the ſame Defence, being aſſoilied.

S. IF it was found in the Wife's Caſe, that the Decreet againſt the Husband was unjuſt upon the Matter; it were hard not to repone the Husband, tho' he neglected his own *Defence*. And ſo in the Caſe of Two Heirs Portioners, the one Major, and the other Minor, and a Decreet given againſt both: If the Minor be reponed, tho' upon a Defence omitted by the Major, yet in all Equity it ſhould operate for the Major. And thus, if a Decreet be given againſt a *Principal*, propoſing a Defence of Payment, but ſuccumbing in the Probation; if the *Cautioner* thereafter purſued, ſhould propone and prove the ſame Defence; he ſhould not only be aſſoilzied, but the Principal alſo ſhould be reſtored: For, *Naturalis Ratio non patitur idem bis exigi*. And material Juſtice and Equity in theſe Caſes ſhould prevail againſt the Rigour of puniſhing Negligence, and even againſt the *Authoritas rei judicatæ*.

Corporations.

N. QUid *juris* as to Crafts and other Incorporations, and as to Biſhops and other ſingle Incorporations, if in any Caſe they may oblige themſelves and their Succeſſors?

S. Crafts, and other Incorporations, acting lawfully; may oblige their Succeſſors *quoad* their common good. But Biſhops, whom the Author terms ſingle Incorporations, being only Adminiſtrators, cannot further bind Succeſſors.

Creditors of the Defunct.

N. IF the Creditors of the Defunct, being Minors, will be preferred to the Creditors of the Heir, tho' they do not Diligence within Three Years?

S. THE Creditors of a Perſon deceaſed, have the Privilege by Act of Parliament, That, doing Diligence within Three Years, they will be preferred to the Creditors of the Heir: *Inde Quæritur*, If the Creditors of the Defunct be Minors, ſhould this Preſcription of Three

Years run against [illegible]
Years doth not run [illegible] ; but this Point needs to be determined: For as to the long Prescription of Forty Years, the Act of Parliament provides expressly, that it doth not run against Minors: whereas it may be in either Cases, that Tutors or Curators may be indued accountable for their Neglect. And these shorter Prescriptions are more for Omission Only; whereas the long Prescription is for pure Negligence of the Party.

Persons convict of Capital Crimes.

N. A Person being convict of a Capital Crime, and the Escheat of his Moveables therethrough falling to the King, and he being keeped in Prison many Years without a Remission, and dying in that Condition: *Quæritur*, Whether the Rents of his Lands in the *interim* not uplifted, will belong to the King and his Donator, or to the Heir? *Ratio Dubitandi*, His Escheat is only what he had the Time of the Sentence; after which he became *civiliter mortuus*; and, being *nullus* in Law, he had nothing to lose; and the King by his Indulgence could not prejudge his Heir, unless he had granted him a Remission, restoring him against the Sentence.

Quæritur, quid Juris, If after he is convict, he should commit Treason, whether he might be Forfaulted in Prejudice of his Heir?

A. By Law, a Criminal escheats only the Moveables he then had; and his continuing under Sentence for Year and Day, doth not make his Liferent-Escheat to fall; because, here is no Contumacy; and the Liferent-Escheat is beyond the Pain of Law. And therefore it may be thought, That whatever falls to a Criminal after his Sentence, and he dying under it; will fall to his Executors. The Author seems to think, That the Rents of Lands, after Sentence, should fall to his Heir; because, by the Sentence he was *civiliter mortuus*, and the King, by his Indulgence, could not prejudge the Criminal's Heir, unless he had granted him a Remission. But this Reasoning appears to be too fine. The Case indeed of a Criminal, sentenced for a Capital Crime, but living, either in Prison or out of it, still unremitted for Years thereafter, and then coming to die naturally, may occasion several Questions. For, What if in that Interval he acquire Moveables? They fall not under his single penal Escheat, (and there is no Liferent-Escheat as said is) and then they they should fall to his Executors and nearest of Kin. And yet, being under Sentence of Death, he is not testable; wherefore, in strict Law, they may be thought to be *Caduciary*. But then suppose, that in the same Interval, he acquires Lands, yet no Man can be served Heir to him; because, it cannot be said, that he died *in pace Domini Regis*, being a Criminal condemned; And yet the Lands could not be found to be Caduciary, for that were a Novelty; and therefore it may be thought, That, seeing he escaped the Sentence of Death, and then coming to die naturally; whatever he acquired in the Interim should fall to his Heirs and Executors, since such was his Fate. But, if in that Interim he should commit Treason; his being formerly sentenced should nothing excuse him, far less be any Benefit to his Heir, as if Justice had wrongously indulged him.

Curator.

N. A Female Minor, being married: *Quæritur*, If the Office of her Curatory doth expire?

S. It is certain, the Office doth not concern her Person, and therefore it comes to be *in potestate mariti*. The Husband also gets a Right to her Moveables *jure mariti*, which is a legal Assignation of them, as if the Curator had consented to it. But as to her other Estate or *bona*, the Curatory stands.

D.

Death-Bed.

N. IF a Creditor may on Death-bed make an heritable Sum *moveable*, by a Charge of Horning?

S. If there appear a visible Necessity for it, the Charge, it seems, should have it's legal Effect to make the Sum moveable; for, if the Creditor on Death-bed should get voluntar Payment, it would have the same Effect. But if the Charge of Horning were affected, and designed on Death-bed to make the Sum moveable; it would differ the Case, and not reach it's Effect. And yet where the Charge is necessarily given, it imports less as to the Intention of the Party; but here, the Intention of the Party on Death-bed should not be regarded.

N. A Person holding Lands Ward, when he was on Death-bed did resign his Estate in Favours of his eldest Son, with the Burden of Provisions in Favours of his other Children; which Course was taken of purpose, to prevent the falling of the Ward and Marriage, his Son being then Minor: *Quæritur*, If his Son may question these Provisions as being *in Lecto*, upon pretence, that tho' on Death-bed he may dispone in Favours of his Heir, yet he could not prejudge him? Answer, It is thought, That the said Right being made *suo modo*, and he having accepted the same, and bruiked by vertue thereof; he cannot question the said *Modus* and Qualification.

S. An Heritor of Ward Lands resigning the same on Death-bed in Favours of the eldest Son, with the Burden of Provisions in Favours of younger Children; and this Resignation being accepted, and the Son infeft; if the Son do really bruik by this Infeftment, he must own the Burthen. But suppose all this to be done, the Son being absent, or *Inscius*, May he own the Infeftment as to the Benefit thereof against the Superior, and disown the Burthen? And it seems he may; for, the Superior cannot complain. And the Son has no Reason to disown the Father's Deed as to himself; and yet he may disown it as to the Burthen; for he may reject the whole (if he please) and enter Heir to his

Father deceased without the Burthen. And if the Son in this Case be Minor, it is yet more evident that he may accept the Infeftment and reject the Burthen. But *verum*, That the whole of this Infeftment being the Father's Contrivance, the Son must own it in all, or reject it in all, and cannot take him to his Service.

N. A Person having provided his Estate both heritable and moveable to his Relict in Liferent, and to his Daughter in Fee, and failzieing of her by Decease to be divided betwixt his Relict and his Brother being his next Heir after his Daughter and her Heirs. And the Brother having accepted of a Share of the Moveable Estate after the Decease of the Daughter. *Quæritur*, If he might question the said Right as to the Heritable Estate as being made on Death-Bed? *Ratio Dubitandi. Utile per inutile non vitiatur*, and the Defunct might on Death-Bed dispose on his Moveables; and the Accepting of the Right as to these does not hinder the Heir to question the same as to the Heritage; whereof he had no Power then to dispose.

S. A Man on Death-Bed having dispon'd his Estate Heritable and Moveable to his Daughter, and failzieing of her by Decease, to be divided betwixt his Relict and his Brother then his next Heir; If the Daughter die without succeeding, and the Brother accept of any Right so as to homologate the Deed; *It is thought*, he cannot divide his Accepting, but must be judged to have consented to the whole; for here it is not *utile per inutile non vitiatur*, but in Effect the Acceptance cannot be *bona fide* divided.

N. A Husband having dispon'd Lands by Way of Gift to his Wife, and having thereafter revoked the said Gift *tacitè* by a Disposition made on Death-Bed in Favours of another Person: *Quæritur*, If the Heir may question the said Disposition upon *Death-Bed? Ratio Dubitandi*, The Heir is not prejudged, in respect the Lands would not have belonged to him but to the Wife: And the Revocation is qualified and only in favours of the Person to whom it is made on Death-Bed, and to no other Effect.

S. For clearing of this Point, it may be first question'd, If the Husband could simply revoke the Deed on Death-Bed? And no doubt he might. If then he might by a simple Revocation exclude the Wife, this Disposition on Death-Bed implies it, and so the Wife is cut off. And yet the Disposition in Prejudice of the Heir cannot subsist; so that all the Difficulty seems to be, If this Disposition on Death-Bed and *tacite* Revocation can be divided? And 'tis thought it may; tho' in the Case of a Disposition with a reserved Power to alter on Death-Bed; and of an after Disposition on Death-Bed, the implied Revocation could not be divided because of the prior Reservation.

Debitor and Creditor.

N. IF for a Sum of Money, Land be Wadset, so that the Granter of the Wadset is not Debitor, there being no Clause of Requisition or Obligement for Re-Payment. *Quæritur*, If there be only a Reversion, Whether will the Granter of the Wadset have the Benefit of the Act

Act *Dalrymple* and *Cardross*; If then the Heritable that Wadset may be restricted to the Annualrent as the Sum contained in the Reversion?

S. This Wadsetter appears to be a Creditor, tho' he cannot crave his Money, for the Reversion provides how the Debitor may pay, and the Creditor must accept.

N. After a Comprising was deduced an Infeftment of Annualrent was granted by the Debitor: And thereafter another Comprifer having comprifed, who pretended that his Comprising should be drawn back to the first, being within Year and Day, and therefore should be preferred to the Right of Annualrent: And that the Debitor being denuded by the first Comprising, had only a Reversion; and that an Infeftment of Annualrent is not *habilis modus*, to give a right of Reversion; and that it was not, nor could be clad with Poffeffion; the second Comprising being before the Term of Payment: *The Lords* brought in the Annualrenter with all the Comprifers, as if he had comprifed the same Day he was infeft, *Colstoun* contra *Nicolas* a Creditor of *Douglas*. *Gibson* Clerk: *Colstoun's* Bond was 16 *February* 1669; Infeft 14 *May* 1669, *Nicolas* comprising 1669.

If the first Comprising and Infeftment should be considered as being to the Behoof, not only of the Adjudger infeft, but of the others, by the Act of Parliament, in the same Manner as if the Infeftment had been so granted expressly by the Superior: *Quæritur, Quid Juris? Ratio Dubitandi*, That even in that Case the Adjudger infeft is only Vassal, so that by him only the Superior has his Casualities. *Homerlef.*

S. If, after an Appriſing, the Debitor give an Infeftment of Annualrent; and then comes a second Compriſer within Year and Day, and so *pari paſſu* with the first: It is too subtil to argue, as if the first Compriſing had so denuded the Debitor that he had only a Right of Reverſion: Which could not be conveyed by an Infeftment of Annualrent. For, no Doubt, a Debitor after Compriſing may give an Infeftment of Annualrent, and the Annualrenter would be allowed to redeem. The *Author* says also, That the second Compriſing was before the Term of Payment of the Annualrent; and so the Annualrent could not be clad with Poſſeſſion before the second Compriſing: But this is only a Speciality. However, the Lords, it seems, brought in the Annualrenter with the Comprifers as if he had comprifed the same Day he was infeft in his Annualrent. But if the Annualrent was base, it would appear, according to the *then* Pratique, that both the Comprifers should have been preferred. But suppoſe the first Compriſing had been perfected by Infeftment, and the Annualrent thereafter also conſtitute by a publick Infeftment, and then follows the second Compriſing: The Act of Parliament ordains indeed Comprifers within Year and Day to come in *pari paſſu*. But it cannot be thought that the Parliament would have brought in the second Comprifer over the mid Impediment of the Annualrent, and so preferred him to the Annualrenter; nor does there appear any Ground of Law for stating them all *pari paſſu*, since the Annualrenter cannot compete with the first Compriſing; and therefore it may well be thought that this mid Impediment hinders the *pari paſſu*; tho' the Lords seem to have judged otherwiſe.

In the Case of Compriſings *pari paſſu*, the first Comprifer perfected by Infeftment, is considered as if the Infeftment had been granted to

all, though yet the Comprisers should be only Vassals, and the Superior his last Creditor, they, as I understand, after the expiring of the Legal.

Nomina Debitorum.

N. IF *Nomina*, which are not *Res*, but *Entia Rationis*, have *Situm*, when the Debitor is in *Scotland, domus remanendi*, and the Debt is contracted with him, as residing there? *Ratio Dubitandi*, They are thought and called a Personal Interest, and therefore should *sequi personam*. *Contrà*, They are, *Res in obligatione & potentia*. 2. If the Creditor be forfaulted in *France*, being a *French*-man, they do not forfault to the King, *Quia subditus amittit* only *quæ sunt civitatis*. 3. They are liable in *Scotland* to extraordinary Taxations. 4. The Debitor is *quasi servus*; & *servi habent situm*. To consider *Quid juris* elsewhere, as to Banks & *montes pietatis*.

S. Nomina Debitorum are not accounted *Res*; nor yet are they mere *Entia Rationis*: But in plain *Scots*, are Debts. And whether they have *Situm*, or not, requires a Distinction; if the *Situs* should be that of the Debitor, or that of the Creditor. But Personal Debts are thought *sequi personam Creditoris*: Yet what may be the Consequence where the Debitor lives in one Kingdom and the Creditor in another, is very uncertain. But, *cum sequuntur personam creditoris*, I should think that wherever the Creditor either transmits or forfaults his Right, it should go accordingly.

Strangers Debts.

N. IF a Stranger contract with a *Scots*-man abroad, that he should pay him presently upon the Place, and the Debitor nevertheless come away without Satisfaction. *Quid juris* as to that Debt, whether it be construed *Nomen Anglicum?*

Quid juris as to *English* Debts contracted betwixt *English*-men in *England*, if the Debitor withdraweth to *Scotland?* ANSWER, It is thought, that tho' *actor sequitur forum rei*, and the Law of *Scotland* has Place in such Cases, *quoad Ordinatoria*, yet the *English* over-rule such Cases *quoad Decisoria*: And a Testament proven in *England* is sufficient.

S. WHEN a Stranger contracts with a *Scots*-man abroad, That he should pay him presently upon the Place; and the Debitor leaves the Place without making Payment: The Stranger may, no Question, follow him, wherever he can find him and his Effects: And tho' the Constitution of the Debt should be regulate by the Law of the Place; yet if it have the *Essentials*, it will subsist *jure Gentium*: Only when it comes to be prosecute, it must be prosecute according to the Law of the Place where it is pursued for.

As to *English* Debts contracted betwixt *English*-men in *England*, if the Debitor withdraw to *Scotland*, 'tis thought, That *Actor sequitur forum Rei*; and he must pursue in *Scotland*, according to the Law there; and, as the Author says, *quoad Ordinatoria*, which I take to be the Form of Process. But what if the Defender should offer to prove Payment by

Witnesses

Witneſſes? as the Law of *England* allows, but not the Law of *Scotland*. And I ſhould think ſuch a Probation in *Scotland* ſhould be rejected: Becauſe the Judge ſhould act according to the Law of *Scotland*. But the Author adds, That in this Caſe, the *Engliſh* Law ſhould over-rule *grund Deciſions*; which would import, That a Probation by Witneſſes ſhould in this Caſe be ſuſtained: Which, I think, a *Scots* Judge ſhould hardly agree unto. The Author ſubjoins, That a Teſtament proven in *England* is ſufficient. And yet a Teſtament Nuncupative made in *England* by a *Scots*-man, was found with us not ſufficient as to the appointing of Succeſſors; and that the Law of the Place did only regulate the *Solemnities* of Writs, but not the *Subſtantials*; *January* 19, 1665, *Schaw* contra *Lewens*. And this Teſtament Nuncupative was likewiſe proven in *England*, and yet rejected by us. But to find, That a Deed is good according to the Solemnities of the Place, and yet as to the Matter, ineffectual, is but a Subtilty, and plain Scorn.

Debitum Annuum.

N. A Brother having given a Liferent-Tack to his Brother of a yearly Duty of Victual out of his Lands, to be payed yearly during all the Days of his Lifetime at *Martinmaſs*; and the Tackman having deceaſed before that Term, Will he have any Part of that Year's Duty in which he deceaſeth? And if there be a Difference betwixt *Debitum annuum & Legatum annuum, cujus dies cedit anni initio?*

S. It may be thought, That the Legal Terms of *Whitſunday* and *Martinmaſs* ſhould ſtill hold, and that *Martinmaſs* is only the Conventional Term: But in effect it were more juſt that this Duty ſhould be accounted and payed *de die in diem*. And the Caſe ſhould have been more clearly ſtated: For *Tacks* are given of *Lands*, and not of *yearly Duties*.

Debitum in Diem.

N. WHAT Courſe ſhould be taken when the Debt is *in Diem*, and the Term of Payment not come; and the Debitor's Eſtate compriſed, and the Compriſing for other Debts like to expire before the Creditor *in Diem* can have a Decreet and Execution thereupon? Sir *Robert Sinclair*'s Daughter.

S. I ſhould think that this Creditor *in Diem* might be allowed to adjudge for Security, in the Terms of the Debt: Even as a Creditor for *Relief*, or *Warrandice*, is allowed to adjudge in Security before Diſtreſs.

Decimæ.

N. *AU Commencement, les Diſmes n' eſtoient le Domaine des gens d' Egliſe: Et les Dons des Diſmes que les Princes et Seigneurs ont fait aux Moines (qui lors n' eſtoient du nombre des Clercs) ont eſté faites de leur biens propres?*

Contrainte de payer les Dixmes, sans contrainte. Dixmes payées par les Chrétiens avant que Charlemagne eût ordonné aux Laïques de contribuer à payer les Dixmes. Grimaud. *de Dixmes lib. 1. cap. 4.*

La contrainte de payer les Dixmes premierement, n'eut fondement certain par l'autorité du Magistrat Civil: Car il ne se trouve aucune Constitution pour Payement des Dixmes dans les Loix Imperiales, Ibidem.

Charlemagne *fut le premier qui les commanda payer.* Ibid.

3. TEINDS, in the New-Teſtament-Church, were not, for many Years, payed, nor judged a Debt; and began to be payed only through the Perſuaſions of Charity; and Arguments taken for the ſame from the Appointments of Teinds by the Law of *Moſes*. And theſe Arguments prevailing upon the Devotion of the Times, brought Teinds in Uſe to be payed. They appear to have been firſt ſettled by Gift, in Favour of Monaſticks; but were afterwards more generally payed, and more ſtrictly acclaimed by the Church and all it's Clergy. Yet a General Civil-Statute for the Payment of Teinds, is not to be found before *Charlemagne*, about the eighth Century. However, two Things may be obſerved:

Firſt, THAT even under the Law of *Moſes*, Teinds were only enjoined and payed as a free Offering to the LORD, but never from any compulſory legal Exaction; as is eaſy to obſerve from many Paſſages both in the *Law* and the *Prophets*.

Secondly, THAT under Chriſtianity, the Church's Right to Teinds ſo far prevailed, that in *Scotland* (to go no farder) ſcarce any Man can be ſaid to have originally a good Right to Teinds for an adequate onerous Cauſe, not even where the true *Decimæ incluſæ* are found; if the Beginning of the Right be ſearched into.

IT may be farther ſaid, That the Beginning of Teinds was pious and honeſt; yet, what by Exaction, and what by the Impropriation of them in after Times, they are become the greateſt Servitude upon Property: And therefore King *Charles* the Firſt, his Endeavour in the Year 1633, as far as theſe Times could ſuffer, to relieve Property of this Servitude of Teinds, was, by himſelf juſtly called his *Glorious Work*. But the Poſſeſſors being unwilling to quite ſuch an Advantage, the *Execution* was ſo contrived, by making the Proprietors the Purchaſers; that the Deſign in a great Meaſure miſcarried. And this Grievance is not like to be fully remedied, until we get an Act of Conſolidation, the happieſt Relief that could happen to Proprietors, thereby putting them all in Poſſeſſion of their own Teinds, but without any real Wrong to Teind-Maſters; only to put all of them, *viz.* Titulars, Tackſmen and others, *in petitorio*; and then to give them ſuch a Conſideration for their Claim, as the Merit and Value of their Right doth require: But ſtill, in the mean Time, the Proprietors to have the Poſſeſſion.

Decreets of the Lords of Seſſion.

N. WHETHER the Sentences of the Lords of Seſſion ſhould be conſidered as Laws; and if notwithſtanding thereof, theſe who are of another Opinion may in Caſes occurring thereafter, vote according to their own Opinion?

S. THE Sentences of the Lords do (no doubt) bind Parties; but no wiſe tye up the Lords diſſenting, that they may not vote according to their own Opinion in like Caſes occurring thereafter.

Deeds both inter Vivos & Mortis Causa.

N. IF it appear by a Paper *in legitima poteſtate*, That the Defunct intended to ſettle his Eſtate, both Heritable and Moveable: Whether will the ſame be valid as to both, ſo that both a Teſtament and Deed *inter vivos* may be conſiſtent in one Paper? *Ratio Dubitandi*, If at the ſame Time there had been a Paper apart, in the ſame Terms, it had been a valid Right as to the heritable Eſtate, being delivered: And it appears, that it were againſt Reaſon that it ſhould be invalid, becauſe it is in a Paper containing a Teſtament, ſeeing *utile per inutile non vitiatur*.

S. It is thought, That a Deed *in legitima poteſtate*, ſettling a Man's whole Eſtate, Heritable and Moveable; may be valid as to both. But if a Man, by way of Teſtament, or by *Words teſtamentary*, diſpone upon Heritage, tho' he be in *leige pouſtie*, it will not hold. And yet all Diſpoſitions, reſerving the Diſponer's Lifetime, with Power to alter, &c; and the moſt Part of Tailzies, and Contracts of Marriage, *revera ſapiunt naturam* of a Teſtament, and fall under it's Definition. And it were worth the clearing what Debts are to be conſtrued *inter vivos*, and ſo not revocable: And what Deeds are teſtamentary and revocable. For, there appears no Reaſon, why a Man may not diſpone upon his moveable Eſtate by a Deed *inter vivos*, as well as upon his Land and Heritage. And why a Diſpoſition of Lands and Heritages, with Clauſes truly teſtamentary made in *leige pouſtie*, ſhould be ſuſtained as *inter vivos*; and yet, if of Moveables, ſhould be doubtful as to it's Import.

Dependence.

N. INHIBITIONS and Arreſtments may be upon Dependence of an Action: *Queritur*, If when Two Citations are neceſſary, the Summons with the firſt Citation thereupon, will import a Dependence before the ſecond Citation.

S. It is thought, That when Two Citations were neceſſary, neither Inhibition nor Arreſtment could hold as on a Dependence, except where a Sentence may follow: And yet if they were uſed upon the Summons and firſt Citation, and the ſecond ſhould afterwards be given; *'tis thought*, They ſhould hold and take Effect upon the Sentence enſuing; for they are both adhibit only, for Security of the Event; and ſo may be thought good upon the Action, if any way commenced and thereafter proſecuted. But now, by the Act of Parliament 1693, both firſt and ſecond Citations are allowed to be given at one and the ſame Time.

Deſtination of Succeſſion.

N. A Bond being granted to a Siſter by her Brother for Proviſion, and to the Heirs of her Body, whilk failzieing to return to him and his Heirs: Whether may ſhe aſſign it without an onerous Cauſe?

Whether the said Bond be moveable, and will fall under Executry?

S. The Sister (*in this Case*) may certainly uplift and dispose of the Money as she pleases; and, wherefore may she not then as freely dispose of it? For, a Substitution doth not of it self hinder the Fiar of a free Disposal. So that unless the Meaning of Parties appear to the contrary, this Substitution should not hinder the Sister to assign freely. But it is further questioned, *Whether this Bond be moveable, or not?* It is certainly moveable. But if she die without Heirs of her Body, it will certainly return to the Granter and his Heirs *in mobilibus*, excluding all her Executors, saving that even in that Case she may testate upon it. And these Things should be distinguished, that they may be the better understood. For, a Bond is moveable, if it neither exclude Executors, nor bear an Obligement to infeft; and yet it will fall according to it's *Destination*, unless the Fiar dispose otherways upon it: Which, if moveable, he may do *inter vivos*, or by Testament.

N. A Man, by his Contract of Marriage, being bound to resign for an Infeftment to himself, and the Heirs Male of the Marriage; which failzieing, his Heirs Male whatsomever: *Quæritur*, If there be no Heirs Male of the Marriage, will his other Heirs Male have Action of Implement; the said Obligement being only in Favours of the Marriage?

If as to other Heirs (That being only a Destination) he may alter it at any Time, *etiam in Lecto*, in Favours of the Heir whatsomever of the Marriage? *Quod in Favorem introductum est, in odium non retorqueter.*

If a Bond were granted by a Person in the same Terms, and were lying by him, might he alter or destroy it *in lecto?*

S. Tho' there be no Heirs Male of the Marriage, and so the Interest of the Contractors appears to be extinct; yet the Obligement in Favours of the Heirs Male whatsomever, will hold: Nor can this Disposition be altered on Death-bed, tho' it were in Favours of the Heir whatsomever of the Marriage; because it is a Matter of *Heritage*. And this *Heir Male whatsoever*, may be a Son of an after-Marriage.

If a Bond were granted by a Person for resigning in the same Terms, and were lying by him undelivered, and so incomplete; he may destroy it. But if it were valid without Delivery, as either, Reserving the Granter's Liferent; or, Dispensing with the not Delivery; he could not alter or destroy it *in lecto*.

Dilapidation.

N. The Act of Parliament 1585, against Dilapidations, provides, That Bishops to be provided thereafter, should find Caution to leave their Benefice as it was at their Entry: And if the Person so provided should do otherwise, the Tacks and other Deeds should be void: *Quæritur*, If they should find Tacks set at their Entry, Whether they may set new Tacks after the expiring thereof; the Benefit being in the same Case by the new Tacks as at their Entry?

S. This Act of Parliament condems all Benefices, greater or smaller, at the King's Presentation: And the Caution to be found, is, That the

N. W HEN Lands are disponed, reserving a Power to the Disponer to dispone the same in Whole or in Part, as if he were Fiar: *Quæritur*, If he be thereafter forfaulted, Will the King have the same Faculty by the Forfaulture? ANSWER, The said Faculty being Personal to the Disponer, upon Personal Considerations, such Reservations being in Rights granted by Parents to their Children, to be Ties upon them that they be dutiful; and because Parents may come to be in that Condition that they may need; and it is just that they have Recourse to their own Estate: Seeing the said Considerations do not militate as to the Fisk, the said Faculty cannot be pretended to be transmitted.

Quid juris, In the Case of a Compriser, whether the said Faculty can be comprised? ANSWER, That the Debitor having the Faculty foresaid ought to dispone for Satisfaction of a just Debt: And if he be so unjust as not to satisfy the Debt, the Law may, and doth dispone; And in Law the Comprising being a Legal Disposition, is equivalent as if the Disposition had been made by himself.

S. IF a Man should dispone his Lands, with Power reserved still to dispone, and come thereafter to be forfaulted; the King will have the same Faculty: For tho' it be Personal, and as the *Author* reasons well, That in Equity it should not forfault: Yet since a Creditor might adjudge it, or adjudge the Lands by Vertue thereof; no Doubt a Forfaulture would go as far.

Dispositio collata in Arbitrium alterius.

N. A Person not being satisfied that his nearest Kinsmen should succeed him, having a great Estate, and they but mean, and who, he conceived, could not represent him creditfully; and not being fully resolved who should represent him; lest he should be prevented with Death, did therefore dispone his Estate in Lands, to such two Persons

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S. Such a Diſpoſition of Lands as is here mentioned, tho' extraordinary, and not in good Stile; yet ſeems to be the ſame with the Matter, as if [illegible] of *Fideicommiſs*, in Favours of his Succeſſor. And that a *Mandate* or Commiſſion expires with the Granter, has many Exceptions, whereof this is One, If it be expreſly conferred in an Event after the Granter's Death.

Diſpoſition.

N. IF a Perſon get a Right and Diſpoſition *omnium bonorum*; Whether will he be liable to the Debt of the Diſponer?

S. When a Perſon gets a Diſpoſition *omnium bonorum*, this *Univerſitas* ſhould *tranſire cum onere debitorum*, tho it were not expreſſed. And for certain, Creditors, in our Law, could otherwiſe reduce it as in Defraud.

Diviſion of the Duties of Lands, betwixt Buyer and Seller.

N. BY the ordinary Cuſtom, when Lands are ſold, If it be a *Whitſunday*'s Bargain, the whole Year's Duty is aſſigned: If it be a *Martinmaſs*-Bargain, only the Half-Year: *Quæritur*, If they be not aſſigned, *Quid Juris* as to the ſaid Duties? Answer, It is thought, the Buyer will be in the Caſe, as we have ſaid of a Comprifer: But the *Queſtion* will be, If the Bargain be made after *Martinmaſs*, and before *Candlemaſs*, the ordinary Term of Payment of Victual? And then it is thought, That the Buyer ſhould be in the ſame Caſe, as if the Bargain had been made preciſely at *Martinmaſs*, if the Price be then payed, or in Condition to be payed, with the Annualrent from *Martinmaſs*; Seeing the Diſponer is in no worſe Caſe than if the Bargain had been made preciſely at *Martinmaſs*.

S. When

Donatio inter Virum & Uxorem.

N. A Woman being induced to consent to a Right granted by her Husband of her Conjunct-Fee-Lands, and making Faith not to question it: *Quæritur*, If she may so far revoke a Donation as to beg Husband, that she may crave the Equivalent?

S. If a Woman consent to a Right granted by her Husband of her Conjunct-Fee-Lands, and ratify the same; she cannot alledge that Consent to be as a *Donation* to her Husband, so as she may crave the Equivalent: For, Consents of this Kind are understood to be in Favours of the Purchaser, and not a Donation to the Husband.

N. Donatio inter Virum & Uxorem being *ipso jure* Null, but so that *morte confirmatur*: *Quæritur*, If a posterior Creditor of the Husband's should comprise Lands given to the Wife, during the Marriage, before the Husband's Death; will his Death confirm the Deed in Prejudice of the Creditor, the Comprising being *medium impedimentum*?

If at least, the *Legal* will belong to the Wife, the Husband not revoking?

If the Husband decease without revoking: *Quæritur*, If the Wife will have Action against the Heir upon that Ground, that the Debt is pay'd out of her Estate, by the Comprising on the Husband's posterior Bond?

S. A Donation, as of Lands, *inter Virum & Uxorem*, is revocable, *nisi morte confirmetur*. But if a Creditor of the Husband, comprise from him, the Lands given; the Comprising will hold, and impede the Confirmation by his Death to be drawn back: Nor would the *Legal* be-

[illegible]

tion made to the Wife. And the very [illegible] an implied Revocation, which cuts off Wholly the Donation to the Wife.

But suppose a Man makes a Donation of Lands to a Stranger in his *leige Poustie*, but expresly *mortis causa*; that is, [illegible] Disposition to be so intended, and disponer only to [illegible] ing of himself by Decease, and with the express Exclusion of his Heirs, which is the very *Character* of a Donation *mortis causa*. Now, the Law provides, That such a Donation may be revoked. And then the Question comes, *If it may be revoked on Death-bed?* And, *If a Disposition to another on Death-bed should imply a tacit Revocation?* But 'tis evident that a Donation of Lands in leige Poustie, tho' *mortis causa*, to a Stranger, is not revocable: For in effect, the most Part of our Tailzies may fall under the same Construction; and yet are not revocable: So that it must be said, The Rule of the Civil-Law, That Donations *mortis causa* are revocable, doth not hold with us, as to Lands and Heritages: And, That tho' it hold in the Case of a Donation by a Man to his Wife; yet it is because such a Donation is by the Law reprobate from the Beginning, *nisi morte confirmetur*.

N. A Debitor having contracted Debt after he had made a Right of Land or any other Donation in Favours of his Wife. *Quærtur*, If *ex post facto* he has revoked *tacitè* the said Donation? *Ratio Dubitandi*, The Donation *inter virum & uxorem* is Null, and *morte tantum confirmatur*. And before it became valid the said Impediment intervened. And since the Debitor might have revoked the said Gift, and might have satisfied the Creditor that Way; his Silence and not revoking is upon the Matter fraudulent, and in Prejudice of the Creditor. *It is thought*, That it is to be considered, if the Debitor or his Heir have no other Estate, out of which the Creditor may be satisfied: In that Case, the Creditor may have Recourse against the Lands disponed to the Wife.

It [illegible]
for the [illegible]
Contract [illegible]
to be [illegible]
to be [illegible]
upon that Ground. That one of the Heirs [illegible] (quarterly as to the Fiar) the Debt wherein the Fiar is [illegible] is satisfied.

S. Where a Man gifts Lands in Favours of his Wife, and then contracts Debt; 'tis thought the simple Contracting of Debt is no Revocation: Tho' the suffering Adjudication to pass for the same Debt, would be construed a Revocation, as if he had actually alienated. But it is farther thought, That, if after the Husband's Death, the Creditor cannot get Payment *aliunde*, he may have Recourse against the Lands disponed to the Wife. But then the Contracting of Debt must be judged to imply a Revocation. And yet if a Man should gift Lands to a Stranger, even *mortis causâ*; that is, By disponing, after his Death, or with Reservation of his own Liferent and Power to alter, which appears to be the same; an after-Creditor, tho' falling short of his Payment, could not reduce it, neither in the Disponer's Life, nor thereafter; but adjudging in the Disponer's Life, it would be effectual.

It may occur here, Whether a Man's disponing to another after his own Death, or, Disponing with a Reservation of his own Liferent, be the same Thing; for so indeed it appears: And yet if a Man resign Lands in Favours of himself, and after his Decease to another, he would remain still Fiar, and so might certainly revoke; seeing the Person substituted to himself must be served Heir to him. And, if a Man's resigning in Favours of another after his own Decease, be understood to have the same Import as if he resigned first in Favours of himself and then to his Successor; or, as if he reserved the intire Right to himself: It may easily be resolved, That *Donationes mortis causâ* of Lands, made in *leige pouſtie*, may yet with us be revoked. And farther, That a Disposition or Resignation reserving the Resigner's Liferent, is no Donation *mortis causâ*; but a Donation *inter vivos* of the Fie, and so not revocable: Which clears the Difficulty abovesaid, and specially *that* about Tailzies. For indeed, *Donatio mortis causâ*, is, when the *Right*, that is, both Fee and Liferent, remains intirely with the Disponer. And tho' a Man's reserving of his Liferent to himself, appears to be a Reservation of the Thing disponed; yet in Effect it is not, but only of the Liferent. It is further *Queried*, If, in the Case of the said Donation to a Wife, and the Husband's simple contracting of Debt thereafter, she may have Recourse against the Heir? And, 'tis plain, she may not: For, if the *Contracting* be a Revocation, her Right is extinguish'd; and, if simple Contracting be *no* Revocation, but only the posterior Creditor falling short of his Payment, and therefore quarrelling and reducing; yet the Heir cannot be concerned. But still here it may be gathered, That tho' this after contracting of Debt be not construed to be a Revocation, yet it must be thought to imply a Revocation in the Event of not Payment; or otherwise, the Creditor could no more quarrel a prior Donation to a Wife than to a Stranger, which 'tis certain cannot be quarrelled by a posterior Creditor.

N. A Woman having made a Disposition to a third Person, to the Behoof of her Husband, and having ratified and made Faith before a Judge: *Quæritur*, If she may question the said Deed, as being *Donatio inter Vi-*

Ground whereby they may be questioned; as *v. g. Minority*, and that the Wife has Consented [illegible] the Husband [illegible] has no other [illegible] Curator, and consequently [illegible] any Deed [illegible] done. And the Act of Parliament [illegible] the Deeds of Wives, is for favours of Strangers, and not of Husbands.

2. A Woman makes a Disposition to a third Person, to the Behoof of her Husband, ratified by her Oath judicially: *Quæritur*, If she may revoke this Donation? And it may be further asked, What if she had made the Donation, directly to her Husband? because his Consent, as *that* of a Curator, is requisite to her Deed; This militates equally against her disponing to a third Party, with his Consent, to his Behoof: For here, he is but a Conjunct *in rebus suis*, as he would be, and is in the former Case: And both would be alike invalide, in the Case of a Minor and a Curator. But besides, It is but groundless to affirm, That a Wife *in manu mariti* is in the Case of a Minor having a Curator. For, if a Minor having his Curator's Consent, yet be lesed, he will be restor'd & repaired: But a Wife having her Husband's Consent to any Disposition she makes, will not be restored. We also see, that Wives, for their Conjunct-Fees or Liferent-Right, do consent ordinarily and validly with their Husband, tho' it be certainly *in rem suam*. And yet the Deed cannot be thus rolled, nor the restored. But if a Minor should thus consent with his Curator disponing, as the Case may be easily stated; it would both be construed *in rem Curatoris*, and therefore null; and likeways it would be revocable on the Account of *Lesion*: So that the Condition of a Wife with her Husband is not the same as that of a Minor with his Curator. And this Matter needs both Explication and Distinction.

But as to the Question of a Wife's disponing in free Gift to her Husband, and ratifying; it may be turned of a Husband's disponing in free Gift to his Wife and ratifying. And 'tis thought, That none can judge such a Donation revocable expresly; which would be authorised Perjury. For, what the *Author* says in this Case, That the Deeds are null, and do not admit of the *Vinculum* of an Oath; may well be denied: They are revocable indeed, but not null. And, 'tis thought, That, in both Cases, whether of the *Wife* or of the *Man*, the Disponer in free Gift, and ratifying judicially, should never be allowed to revoke; and that the Case of the Oaths of *Minors*, reprobate by a late Act of Parliament, cannot be extended to this Case, where Perjury is so odious. And yet it may well be thought, That, tho' a judicial Ratification excludes a direct Revocation; yet it could not hinder the Effect of a tacite Revocation, at least by Comprising; nor could it hinder a second Disposition to another, specially if onerous: For it seems the Disposition would hold as to the Receiver, tho' it may be still thought, That the Disponer or his Heir should at least make good his Ratification by Oath; and yet the Case is the same in Law with that of a Comprising. And therefore, upon the whole, Tho' I judge, that a Husband or Wife disponing to each other in free Gift, and ratifying judicially, cannot revoke directly, because of the Oath interponed; yet

revoking; Whether will the Gift be valid? For, in Legacies, *Judex Donationes ejusmodi æquiparantur*, If the Legatar decease before the Teſtator, the Legacy is void.

S. But, I doubt, it would be ſo in this Caſe with us.

Donatio non acceptata.

N. If a Donation be made, but not accepted [illegible] Creditor may comprize the ſame, and accept [illegible]

S. If a Donation be made, and not repudiate [illegible] will be held as accepted, ſo as if a Creditor ſhould affect [illegible] could not thereafter repudiate the ſame.

Donatars upon Recognition and Forefaulture.

N. After Lands holden of the King had fallen under Recognition, they fell alſo under Forefaulture, and after the Deceaſe of the forefaulted Perſon a Gift of the ſaid Lands was given upon the Recognition, and thereafter another Gift was given upon the Forefaulture; it not being known by the King or his Officers, the Time of the firſt Gift, that the Perſon forefaulted had committed Treaſon? *Quæritur*, Which of the Donatars ſhould be preferred? *Ratio Dubitandi*, That Recognition is but a Caſuality; and after the Vaſſal was forefaulted, the Property was thereby devolved to the King *ipſo jure*, and all Caſualities ſeem to be extinct, and conſolidate with the Right of Property: And the Right upon Recognition does not belong to the Superior *ipſo jure* before Declarator.

S. It is thought the Donatar of the Forfeiture, as being the ſtronger Caſuality, ſhould be preferred. But if the Recognition had been gifted tho' not declared, *before* the Forfeiture, I would prefer the Recognition, as lawfully gifted. And in reſpect that the *Declarator* is but a proceſſing Solemnity, yet in the Caſe of an after Forfeiture, the Act of *quinquennial Poſſeſſion* might fruſtrate the Recognition.

Duels and Flame-ſticken.

N. If Flame-ſticken, or Fighting of Duels be Capital, though no Perſon be killed?

S. HAMIL-[redacted] is thought *Capital* tho' no Perſon be killed; but in that Caſe it ſhould be both [redacted]

As for Duels, by [redacted] Ja. VI. Parl. 16. Cap. 11. the very *Fighting* is made Capital. And by the Act [redacted] Parl. 1. Seſſ. 6. [redacted] albeit no Perſon be killed, [redacted] Baniſhment and Eſchet.

Emancipatio.

N. [redacted] IF by our Law, Children after Twenty Five Years may Emancipate themſelves, and live by themſelves, and leave their Father and his Family? *Cogitandum.* WHETHER if they go out of the Family without the Father's Conſent they may claim a Bairn's Part?

S. It's thought Children cannot emancipate themſelves. And that if they leave their Father and his Family, without his Conſent, they ſhould be refuſed a *Bairn's Part*; for, the Separation ſhould make againſt them, and not for them. Yet it can hardly be determined what the non Emancipation in this Caſe ſhould ſignify to their Prejudice.

What Way the Buyer may be urged to Enter.

N. IF the Buyer lie out, What will be the Remedy for the Superior? ANSWER, He may purſue to hear and ſee him decerned to Enter, and to pay Compoſition: And without Prejudice of that Decerniture, if he continue to lie out, To hear and ſee it found that the Lands are in Non-entry; and that the Superior, as to Caſualities, ſhall be in the ſame Caſe as if he were Entered.

S. IF the Buyer lie out, unentered, the Superior hath no Remedy; for, he may poſſibly hold of the Diſponer, and without Hazard, if they be not Ward-Lands: And whether they be Ward-Lands or not, the Superior hath no Remedy but to take his Caſualities as they fall by the Diſponer, as if the Lands had not been fold, and as the Law allows him.

Entry of Aſſignies upon Reſignation.

N. IF the Alienation and Reſignation be aſſigned, *Quæritur*, If the Superior may be compelled to enter the Aſſigny, ſeeing both are in Favours of Heirs and Aſſignies? ANSWER, *Negativè*, Unleſs a

Com-

Seeing

S. If the Allegiance be alleged, the Superior cannot be compelled to enter the Allegiary; but only the Cedent in whose Favours it was Disponed, or his Heir; but not his Allegiary without a new Composition. For this is just as if the Resigner had been Infeft, and had of new Disponed.

Entry upon Resignation by a singular Successor.

N. WHAT Way a singular Successor in the Right of Superiority, may be urged to Infeft upon Resignation in his Author's Time, seeing he does not represent him as Heir, and is not bound to the Buyer by Contract or *quasi*? Answer, There is *Obligatio in rem*, as in the Case of Servitudes and Annualrents. And he may be pursued summarly to hear and see him decerned to Enter the Buyer: And to that Purpose to give him a Charter of the Tenor exhibited: And upon a Bill the Director to the Chancery may be ordered to give out a Precept in *subsidium*.

S, If a Superior, after Resignation made and accepted, should denude himself of the Superiority, his singular Successor cannot be obliged to complete the Infeftment. The Author thinks, *The Successor may be decerned to do it: Or, That on a Bill the Director of the Chancery may be ordered to give out a Precept* in subsidium. But for this I see no Ground; the singular Successor being no wise obliged to perform his Author's Acceptance; that Acceptance being Personal, and no wise affecting really the Superiority.

Liferent Escheat.

N. A Vassal, having granted a subaltern Right, being Year and Day at the Horn, forfaulteth only his own Right of Liferent, without Prejudice to the Sub-vassal. Whereupon it may be *Queried*, If a Vassal has disponed his Right, but so that the Party Acquirer is not Infeft, will, notwithstanding, the Disponer's Liferent fall? Answer, *Affirmativè*. And the *Ratio Dubitandi* is of no Weight: *Viz.* 1. A Tacksman, tho' the Duty be not proportionable, will not be prejudged. 2. If the Receiver of the Disposition be Rebel *per annum*, and the Lands hold of the King, the King will get *eodem tempore* Two Liferents of the same Lands: *Viz.* One by the Rebellion of the Disponer, and the other by the Rebellion of the Receiver. For as to the First, a Tacksman has a real Right and Interest, which militates against a singular Successor. And as to the Second, there is no Inconvenient, that the Superior should have the Liferent of his Vassal; and if the King be Superior, that he should also, as King, have the Liferent of his Subject; and any Benefit may accrue to him by the Disposition and Warrandice thereof, during his Lifetime.

[illegible]
Day at the [illegible]
before the [illegible]
the Diſpoſer [illegible]
Rebellion [illegible]
rent-Eſcheat vaking hereafter.
has only diſponed, and the Acquirer [illegible] *Will the Diſponer's Life*
rent-right [illegible]
in Diſpoſition will not be [illegible]
becauſe this Deed gives him [illegible]
But if the Receiver of a Diſpoſition of Lands holding of the King be
Rebel *per annum*, the *Author* thinks the King will have two Liferents.
One by the Rebellion of the Diſponer his Vaſſal, and the other by the
Rebellion of the Receiver. But both *this*, and the import of it may be
doubted: For, *Duæ cauſæ lucrativæ in eandem rem concurrentes non ſolent*

N. In a Perſon infeft in Liferent, be denuded by an Aſſignation of
the Liferent, which is only *habili modo* in reſpect Liferents conſtitute
by Infeftment, are Perſonal, and cannot be conſtituted by Reſignation?
Quæritur, If the Liferenter be Year and Day Rebel after the Aſſigna-
tion, Will the Superior have Right to the Duties?

S. A Perſon infeft in Liferent may denude thereof by Aſſignation in
the *habili modo*. But if the Aſſignation be not intimate, or the Aſſig-
ny in Poſſeſſion within Year and Day, the Liferenter's Eſcheat will vake
by his Annual Rebellion, in Prejudice of the Aſſigny.

N. A Lady Tercer, or Tenent by Courteſy, their Lands holding of
another Superior than the King, and they not being Vaſſals to him;
Whether will their Liferent fall to the King, being Year and Day at
the Horn?

S. A Lady Tercer, or a Husband having the Courteſy, tho' their Lands
hold of a Subaltern, and not of he King; yet their Liferent Eſcheats
upon their annual Rebellion will vake to the King, for in Law they are
ſuppoſed as if their Rights had been conſtitute by Reſignation. But
then if another, not the King, be the Fiar's Superior, the Queſtion will
recur; and 'tis thought that both the Terce and the Courteſy being
conſtitute by Law, without any *Holding*; the Liferent Eſcheat ſhould
ſtill vake to the King *jure coronæ*.

N. A Perſon being denounced in *April*, and continuing Year and
Day at the Horn, *Quæritur*, *quando dies cedit*, of the Liferent falling
to the Superior of the Lands ſet to Tenents? And whether or not the
Superior will be in the Caſe of a Liferenter ſurviving the Fiar; ſo that
he will have Right in the Caſe foreſaid, to the full Duty of that Year
that the Liferent falls, *per lapſum anni & diei*?

Quid Juris, Where the Rebel laboureth himſelf, will he not be liable
to the Superior for the Duty of that Year, as if he were a Tenent?

S. A Perſon being denounced in *April*, and continuing Year and Day at
the Horn, the Liferent falls immediately to the Superior, and will give him
Right to the ſubſequent Duties, due by the Tenents for the *Whitſunday*
and *Martinmaſs* enſuing, if once the Eſcheat be declared. And if the
Rebel labour himſelf he ſhould be liable to the Superior for the Duty of
that Year, as if he were a Tenent.

N. If

[illegible] be inferred [illegible] Master Servitudes upon the [illegible] Servitudes without Writ; [illegible] ways; and that the Right in the Perſon of the Diſponer to be holden of the Superior, is in Effect to the Buyer's Behoof, until they be confirmed: And Reverſions yeerfrae, even before the Act of Parliament anent the Regiſtration of the ſame, at leaſt Comprifers will be liable to ſuch Obligements; ſeeing they comprife only ſuch a Right as their Debitor had: And they are in uſe to comprife all Contracts and Diſpoſitions, and therefore ought to be liable *in rem* to all Obligements upon the Debitor and his Succeſſors, relating to the Lands comprifed.

To conſider, If there be not a Difference betwixt Obligements as to Liferent Eſcheat and others; theſe as to Liferent Eſcheat being contrary to Law, and ſuch as give *occaſionem deſcendi*; and if ſuch an Obligement be not fulfilled, to whom will the Liferent belong? Whether to the mediate Superior, ſeeing the immediate has renounced? Or to the King as *abdicatus ab indigna*?

§. If is ordinary, in Diſpoſitions bearing Obligements for double Infeftments, to provide, That while the Buyer and his Heirs, hold of the Granter and his Heirs, he ſhall be entered *gratis*, and have his own Non-entry and Liferent Eſcheat as then gifted to them. And, *the Author thinks*, this will bind a ſingular Succeſſor, if the Obligement be inſert both in the Charter and Saſine. But ſtill it may be *doubted*, if this can make the Obligement *Real*, which in it ſelf is only *Perſonal*; However, this appears all that can be done to *make* the Obligement real, and that leſs will not do it; though Clauſes of Reverſion were *Real* even before they were appointed to be regiſtrate; for ſtill there is a Difference betwixt the ſaid perſonal Obligement and a Clauſe of Reverſion. And it ſeems hard that a perſonal Obligement which properly binds not till the Caſuality fall, ſhould bind a ſingular Succeſſor when the Caſuality falls to him. The *Author* moves a Doubt as to the Obligement for the Liferent Eſcheat as if it gave *occaſionem ſecundi*. But this is but a Conceit and if the Obligement ſhould be in this reſpect reprobate, it ſhould be null, and if carried further this Eſcheat falling to the Diſponer who renounces it, ſhould be taken from him *tanquam ab indigno* and belong to the King.

N. If a Liferent-Eſcheat be gifted to the Rebel himſelf, being yet at the Horn; Whether will it fall under his ſingle Eſcheat, or Liferent to the King?

If the Liferent be gifted by the Superior to the Vaſſal himſelf, being relaxed; and, if thereafter he be Year and Day at the Horn: Whether or not his Liferent will of new fall to the Superior? *Ratio Dubitandi*, he cannot have two Liferents of one Perſon.

[illegible]
Rebel [illegible]
and ſuch [illegible]
Effect [illegible], if [illegible]
him gifted to [illegible]
ſimple Eſcheat: [illegible]
poſed.

If the Liferent be [illegible]
ed; it appears to be [illegible]
Year and Day at the Horn; [illegible]
rior, as if it had not fallen before.

N. If there be a Difference betwixt the Caſualities of Ward and Nonentry, and a Liferent-Eſcheat, which has alſo ſomething temporary in reſpect the Liferent-Eſcheat falleth *ex defectu*, and but once, and is *Jus collectivum* of all Years falling under Liferent: Whereas Ward and Nonentry are of the Nature of *annua Legata*, and are in Effect *annua Ceſſiones*, which are only effectual during the Cedent's Right? *Vid.* Title, *If Gifts of Ward and Nonentry prejudge ſingular Succeſſors, in Lit. G.*

S. This Diſtinction is but fubtil and imaginary. No Doubt *Ward* and *Nonentry*, being gifted, they are good to the Donatar, even againſt the Giver's ſingular Succeſſor. And that of *annua Ceſſiones*, we underſtand not, ſave in the Caſe of an Aſſignation to Mails and Duties; which is therefore thought to be cut off by the Cedent's diſponing the Property, after which it will not militate againſt the ſingular Succeſſor.

N. If a Perſon being at the Horn ſhould ſuſpend and relax, and thereafter the Letters being found orderly proceeded, ſhould be denounced: *Quæritur*, If the Time of the former Rebellion would be continued with the laſt as to the Queſtion of the Liferent, as if the Rebel had not been relaxed?

When Reverſions, or Minutes bearing Obligements to diſpone in Favours of the Rebel, do fall under Liferent-Eſcheat: *Quæritur*, What Benefit or Right will the Donatar have? Answer, It is to be conſidered, what Benefit the Rebel would have; and the Liferent thereof will belong to the Donatar.

If an Heritor be Year and Day at the Horn, and there being a Subaltern Right holden of him for a ſmall Feu-duty, the Superior would get his Liferent only as to that Feu-duty, there being no more his.

S. It may be thought, That if a Perſon being at the Horn, ſhould ſuſpend and relax; and thereafter the Letters be found orderly proceeded; and he denounced: The Time of the *former* Rebellion would *not* be continued with the *laſt* as to the Queſtion of the Liferent; the Annual Contempt being interrupted: And if in the *Interim* he ſhould even diſpone in Prejudice of the Liferent-Eſcheat: Yet it may be thought, That the *Relaxing* puts the Acquirer *in bona fide*: For all Eſcheats are *odious*: And the Rebellion was not then *in curſu*.

The other Two *Queſtions* are plain, and require no further Anſwer.

N. Quæritur, If there be a Liferenter holding of the Superior, and ſhe having aſſigned her Liferent during her Lifetime, Whether or not

by the Liferenter is only Personal, as a Disposition made by the Heritor, whereunder [illegible] right; and *to represent*, falleth.

S. The Assignation doubles validly of the Liferent Right, if either the Assignation be intimate, or the Assigny in Possession before the annual Retour: It prejudges the Superior: But if either Proprietar or Liferenter should only give an Assignation to Mails and Duties for a certain Number of Years, here the Liferent Escheat would cut off the Course of the Assignation, as of *annua Cessiones*.

Escheat single.

N. IF an appearand Heir have Right to a moveable Heirship, and the same or neareſt of Kin have Right to be Executor, but neither the One is served, nor the other confirmed, and both be at the Horn: Whether will their Intereſt foreſaid fall under Eſcheat, as in the Caſe of Forfaulture: Seeing Eſcheats are Forfaulture as to Moveables?

If a Tack, being for many Nineteen Years, ſhould be aſſigned; Will the ſame fall under the ſingle Eſcheat of the Aſſigny, ſeeing there is no Liferent as to him, and the Liferenters may all die in his Lifetime?

Will not the Aſſigny have Right for the Lifetimes of the Heirs, tho' they be not ſerved Heirs?

The Tack being for Three Lifetimes, and certain Nineteen Years after; *Quid Juris*, Where the Tackſman has no Heirs, ſo that there is Place to a Gift of Baſtardy or *ultimus Hæres*?

A Tack of Teinds being granted to the Tackſman and his Heirs and Aſſignies, for Three Liferents, and Three Nineteen Years; and being thereafter aſſigned: *Quæritur*, If the Aſſigny be at the Horn, Whether it will fall under his ſingle Eſcheat? Answer, It is thought, It will; ſeeing it is not a Liferent-Right as to the Aſſigny, and the whole Liferents may be determined during the Aſſigny's Lifetime: And a Tack for Three Nineteen Years, doth fall under ſingle Eſcheat.

Quæritur, If a Tack exceeding the Life of Men, *v. g.* for Eight, Nineteen Years, falls under ſingle Eſcheat?

S. The moveable Heirſhip falls to the apparent Heir, and other moveables to the neareſt of Kin; But, if the apparent Heir not ſerved, or the neareſt of Kin not confirmed, ſhould be at the Horn; *it is thought*, their Intereſt foreſaid not being eſtabliſhed, would not fall under Eſcheat, whatever may be the Rigour of Forfeitures. But in Caſe there were an Executor confirmed, whereby the neareſt of Kin, tho' not confirmed, would have his Claim, this Claim would fall under his ſingle Eſcheat.

If a Tack, ſet for ſome Lifetimes and ſome Nineteen Years, ſhould be thereafter aſſigned; it ſeems, it would fall under the Aſſigny's ſingle Eſcheat; For, by the Act of Parliament *Ja.* VI. Par. 22. Cap. 15. Tacks for Life are only under *Liferent-Eſcheat* in the Perſon of the Tackſmen; but, in the Perſon of the Aſſigny, under *ſimple Eſcheat*.

As for Nineteen Years Tacks, they are ordinarily equiparate to Liferent Tacks; and yet they fall under the *ſimple Eſcheat* even of the Tackſman himſelf. But to make a Tack of ſeveral Nineteen Years,

[illegible] the Tackſman [illegible] not ſerved.

WHERE a Tack is ſet for Three Lifetimes and Nineteen Years thereafter, to a Tackſman who has no Heirs, as in the Caſe of Baſtardy or *ultimus Hæres*; tho' theſe *Three Lifetimes* can hardly be meaſured or determined, yet the Tack will hold to the *ultimus Hæres*, at leaſt for the Nineteen Years: And, if the Three Lifetimes ſhould be taxed to Three Nineteen Years, the Reckoning ſeems reaſonable. The Author is of Opinion, That a Tack of Three Liferents and Three Nineteen Years being aſſigned, falls under the Aſſignay's ſingle Eſcheat, as hath been ſaid. But the Hardſhip of the Caſe is alſo obvious; for, What if the Tack were ſet for many Nineteen Years exceeding even a Hundred, reckoned to be the utmoſt Period of a Man's Life?

Eſcheat without Backbond.

N. IF the King may re-grant Eſcheats, without a Backbond, and declare that it is his Pleaſure ſo to do? ANSWER, It is thought that the King is in no worſe Caſe than other Superiors, who do always give Eſcheats of their Vaſſals Liferent, (and if they be Lords of Regality, their ſingle Eſcheat) without Backbond.

S. If in a Gift of Eſcheat granted by the King, it be expreſly declared, That there ſhould be no Backbond, the Gift may hold; as well as Lords of Regalities and other Superiors do gift their Eſcheats without Backbond. But the Cuſtom of the Exchequer is, to paſs no Gift of Eſcheat without a Backbond; and if the Gift ſhould bear otherwiſe, *It is thought*, The Exchequer would firſt repreſent it.

Delivered Evidents.

N. A Perſon having a Bond of *Fifty Thouſand Merks*, did aſſign the ſame to the Debitor; But ſo that the Debitor by the Aſſignation and accepting thereof, was obliged to pay the ſaid whole Sum (reſerving the Cedent's Liferent) to the Perſons therein mentioned, amongſt them: *Quæritur*, The Aſſignation being never delivered to the Aſſignay, and recovered after the Cedent's Deceaſe, *viis & modis*, Whether it will be a binding Writ? ANSWER, The Caſe will not be without Queſtion: *Ratio Dubitandi*, That Deeds and Writs that are ſingle and *monopleura* do not bind, unleſs they become the Parties Evident by Delivery: And on the other Part, Contracts ſubſcribed by two Parties retained in the Hands of one, are valid, though not delivered to the other: And the ſaid Aſſignation is not a ſimple Deed, but bears reciprocal Obligements which are as binding as if they were ſubſcribed by both. 2. The ſaid Aſſignation, though it appears to be *actus inter vivos*, yet upon the Matter is *donatio mortis cauſa*; and the Defunct's Will as to her whole Eſtate, and to whom it ſhould belong after her Deceaſe: And ſuch Writs, being of the Nature of *Wills* and *Legacies*, may be retained, and are valid though not delivered.

S. THIS

Reserved Liferent is [illegible] *Intimation with the not Delivery:* And likewise [illegible]

Exception against the Cedent, if always competent against the Assigny?

N. Quer. IN general, if all personal Obligements, and Exceptions competent against the Cedent, be competent against the Assigny? And, What Reason there is, that *discharging, Compensation,* and the *suspending of Payment for a Time,* and such like, should be competent against the Assigny. And not such as are founded upon correspective Writs, which import Retention, or, Suspending of Implement against the Cedent?

S. A written Discharge, or, Compensation by Writ, or, Suspension of Payment for a Time, intructed *scripto*. Are all good against an Assigny. And if there be any other competent Defence that can be proven *scripto* against the Cedent, it should also be received against the Assigny. But the particular Case will best clear the Point of Right.

Executor.

N. IF the Executor *ad omissa* be accountable to the neareſt of Kin, who are not accessory to the Fraud of Omission?

S. THE Executor *ad omissa* should be accountable still to the neareſt of Kin, if innocent of the Omission.

N. IF the Creditors and neareſt of Kin have such an Intereſt in the Goods confirmed, that they are preferable to the Executor's own Creditors? Or, If after Confirmation, there be a Confusion, as in the Case of an Heir?

S. THO' the Goods of the Executry may be thought to be confounded, at leaſt after Executry with the Executor's proper Goods: Yet in a Competition betwixt his Creditors and the Creditors of the Defunct, I would prefer the *Defunct's* Creditors to *his* Goods, so long as they can be qualified to be extant. For whatever Right an Executor may obtain by the Execution so as to give him a free Disposal; yet since the Rise both of his Office and Right was to execute for the Behoof of the Defunct's Creditors, they ought still to have the Preference as to the Goods extant.

N. WHEN there is only One Child, who is both Heir and Executor; Whether there will be only a bipartite Division betwixt the Defunct and Relict?

S. SEEING, in this Case the Relict's Right is not to be bettered; why should the Bairn be prejudged of his Right, tho' he be also Heir.

S. An Executor [illegible] but 'tis thought, only for his own Satisfaction: For if he be satisfied of his own Debt, there is no [illegible]

N. If the Defunct [illegible] the Person of the Executor by Confirmation, that there is a Confusion of it with his own, so that his Creditors may affect [illegible] in Money or in Goods; and doing *prior Diligence*, will be preferred to the Defunct's Creditors? *Ratio Dubitandi*, The Executor is *Hæres in mobilibus*. On the other Part, he has only an Office; and the Administration is committed to him by the Commissars; and he finds Caution to make forthcoming. And if he die before the Testament be execute, another will be confirmed *ad non executa*: And upon the Matter he is *Curator bonis*.

S. This Question is already answered, *Q. 21 h. t.*

N. A Child being confirmed Executor to the Grandfather upon the Mother's Side, and dying without Issue and either Brothers or Sisters: Will the Father have Right to the Executry, as Executor to the Child? 2. What if the Child decease before the Testament be execute? 3. Can the Father be Executor *ad non executa* to the Grandfather?

S. Seeing the Father hath the Right of Succession, there is nothing to hinder it: But if the Child die before the Testament be execute, the Father cannot be Executor *ad non executa* to the Grandfather; because the Child's Right evanishes, and gives Place to the next neareſt of Kin of the Grandfather. But, *What if the Child, deceasing, be confirmed?* Is not Confirmation, in some Cases, reckoned as *Aditio*, in order to Transmission?

N. Executors nominate, (tho' Strangers, and not Universal Legatars) before King *James* his Act of Parliament, had Right to the whole Executry; and since, to the Third: *Quæritur*, If they decease before Confirmation, Will they notwithstanding have Right as Legatars?

If they be confirmed, and die immediately before the Testament be execute; Whether the Executor-Stranger will have Right to the Third?

S. Executors nominate, being *Strangers*, and not *Universal Legatars*; 'tis thought, *before* the Act of Parliament *Ja.* VI. Par. 22. Ca. 14, they had Right to the whole *Executry* or *Dead's Part*; for so the Act seems to suppose this as an Abuse: But *since*, they have only Right to the Third of the Dead's Part. But if they decease before Confirmation, their Office evanishes, and they should have Right to nothing: And tho' they do confirm, but die *before* the Testament be execute; they should have no more Right: For, the Act of Parliament seems to give them the foresaid Third, for the Office and the Execution thereof; but not at all as a Legacy.

N. The Office of Tutrix ceaseth by her Marriage, but not that of Executrix: *Quæritur, Quæ Ratio Discriminis?* Answer, She being *in Tutela* herself, cannot be *Tutrix* to another. 2. An Executor has not *nudum Officium*, but is Heir *in mobilibus*: And for that Reason, a Woman maybe Executrix, tho' incapable *munerum virilium*.

[illegible]

[illegible]

[illegible]

[illegible] and [illegible] to the [illegible] Executor. An Executor nominate dying after Confirmation but before Execution, and being a Stranger, it is subsisting by the third Act of Parliament he hath only the Half of the Dead's Part, in so far as the Testament is execute, because the same seems to be granted to him for his Pains, but if he decease before he confirm, he can claim nothing.

N. Where the Procurator Fiscal is confirmed after an Edict served, Whether will the neareſt of Kin being Majors the Time of the Confirmation, and not owning their Intereſt, be excluded; So that they can have no Action againſt the Procurator Fiſcal or Biſhop for the Goods contained in the Inventar?

Quid juris as to the neareſt of Kin for the Time; And if he be reponed whether will he have Action of Compt and reckoning, or muſt he reduce the Confirmation ſo far as that he may be confirmed; the Procurator Fiſcal being ſatisfied of all Charges? *Ratio Dubitandi*, that the neareſt of Kin is not *nomen juris* to ſucceed, for to have any thing belonging to the Defunct unleſs he repreſent him, which he cannot, unleſs he be confirmed Executor.

S. If a Procurator Fiſcal confirm after Edicts ſerved, it ſhould not at all exclude the *neareſt of Kin*, ſince he gets only the Office as *Curator bonis* to preſerve the Goods to theſe having Intereſt: ſo that the neareſt of Kin ſhould either be ſurrogate if he crave it, upon Payment to the Fisk of all his Charges; Or, he may purſue as ſuch, the Procurator Fiſcal for what falls to him, tho' he be not confirmed Executor. For, the neareſt of Kin in this Caſe is *nomen juris*, and he will be liable to Creditors in ſo far as he receives. But what he receives will exoner the Fiſcal decerned dative.

N. Quid juris, In the Caſe of an Executor Creditor after he is ſatisfied, will the neareſt of Kin be excluded? And if not, what is the *habilis modus* to get a Right ſettled in his Perſon? *Ratio Dubitandi*, in ſuffering the Creditor to be confirmed, it ſeems that he has diſclaimed his Intereſt, and not without Injury to the Memory of the Defunct: And the Creditor being once confirmed, the neareſt of Kin cannot be confirmed: And having forefaulted his Intereſt, it may ſeem, *quod indigno aufertur, eſt Fiſci; & quod nullius eſt, eſt in bonis Regis.*

S. In the Caſe of an Executor Creditor, after he is ſatisfied, the neareſt of Kin, *'tis thought*, will not be excluded: For, what hinders him to be Executor *quoad non executa*, or even if he offer to pay the Creditor, to reduce his Confirmation and come in his Place, for that the *Creditor being once confirmed, the neareſt of Kin cannot be confirmed*, is gratis dictum. And, *that the neareſt of Kin not confirming, ſhould be thought*

to [illegible] Law has laid no Obligation upon him, and, he may [illegible] as he pleases.

N. [illegible] there is no Place to [illegible] Goods whereof the Executor is presently in [illegible] And as to *Nomina* and Debts it be not [illegible] they be not uplifted; seeing after Sentence the Executor may [illegible] And in that Caſe, may not the Executor's Executor confirm the ſame as belonging to the Defunct?

THOUGH after Sentence the Debt be *in bonis* of the Executor, and confounded with his own Eſtate; If there ſhould be a Competition betwixt the Executor's own Creditors, and the Creditors of the Defunct or his Relict and Bairns; Would not the Creditors, and the Relict and Bairns of the Defunct, be preferred to the Creditors of the Executor, upon that Ground, that they are not ſimply the Executor's Goods, but in Truſt; and is a *fideicommiſſum* for the Uſe of the Defuncts Creditors, and his Relict and Bairns: So that both the Executor's Creditors and Fisk ought to be excluded upon any ſuch Competition?

S. AS to *Goods* in the Executor's Poſſeſſion, the Teſtament is thought to be execute by *confirming* them. And as to *Nomina* and Debts, it is thought to be execute by *Sentence*; for after Sentence, the Executor may aſſign: And the ſame Debts ſo execute, will fall to the Executor *of* the Executor. But ſtill the Creditors of the firſt Defunct ſhould be preferred to all the *bona extantia*; at leaſt to the Creditors of the *firſt* Executor, and alſo of *his* Executor. But, as to an Aſſigny, made by the Executor, of what is execute; it is thought, the Aſſigny ſhould be ſecure, ſince the Executor finds Caution: And otherways, the Aſſigny might be enſnared. And thus though after Sentence, the Debt be thought to be *in bonis* of the Executor, ſo as he may freely diſpoſe thereon; Yet both the *Creditors* of the Defunct, and his *Relict* and *Bairns*, ſhould ſtill be preferred to the Executors *own* Creditors *quoad bona extantia*, as ſaid is; becauſe an Executor is but originally an Office.

N. IF the neareſt of Kin will not be Executor: *Quæritur*, What Remedy will be competent to the Creditors, not of the Defunct, but of the Executor; ſeeing there is an Act of Parliament, in caſe of an Heir's not entering: But not in the Caſe of an Executor in Behalf of Creditors?

IF the Commiſſars ſhould confirm the Creditor of an Executor nominate, and the Executor deceaſe; Will the next neareſt of Kin have Action againſt the Executor-Dative to be comptable? And whether that Executor will have the Privilege of an Executor Creditor? And if he may be purſued at the Inſtance of other Creditors, who are not Creditors to the Defunct?

S. THE Queſtion, *If the neareſt of Kin will not be Executor, What Remedy may his Creditors have to compel him for their better Payment?* Seems to be determined by the Act 41. Parl. 1695. But, There, there is a *Proviſion*, That the Creditors of the Defunct doing Diligence to affect the ſaid moveable Eſtate within Year and Day of their Debitor's Deceaſe, ſhall always be preferred to the Diligence of the ſaid neareſt of Kin. Which, *it is thought*, ſhould be, to the Diligence of the ſaid neareſt of Kin's Creditors: And alſo, that even after Year and Day,

N. An Executor be not *hæres in mobilibus cum beneficio*? If

S. If there be another [illegible] Defunct, this Nearer will be preferred; For, Confirmation without Executry is only accounted as *Aditio* in the Case of a Heirs transmitting into Right to the Dead's Part; but no further, as may afterwards occur. But *vice versâ*?

An Executor has some Analogy to a *hæres in mobilibus cum beneficio Inventarij*; but still with some Difference from a *hæres cum beneficio* in the Civil Law.

Executor-Creditor.

N. A Creditor being confirmed Executor, and dying before the Testament be executed; Will not his neareſt of Kin be confirmed *ad non Executa*, and exclude all other Creditors, in reſpect of the Diligence of his Predeceſſor, and that Confirmation did affect the Goods for their Satisfaction?

Three Creditors being confirmed for their reſpective Debts, and one of them deceaſing before Sentence: *Queritur*, Will the Office and Benefit belong to the Survivers entirely? *Ratio Dubitandi*, A Teſtament Creditor is a Diligence, and there is no other Way of Diligence to affect the Moveable Eſtate of a Perſon deceaſed, and it is equivalent to Diligence againſt Debitors on Life, affecting their Moveables. And on the other Part, Executory being an Office the Law preferreth the Creditor, if the neareſt of Kin do not own it; but *cum ſua cauſa*, and ſo that the Nature of the Thing is not altered: And therefore the Executor dying, the Office and Diligence doth evaniſh.

Quid juris in the Caſe of an Executor Creditor: If after he is ſatisfied, the neareſt of Kin will have any Action for the Superplus?

If a Teſtament be execute by a Sentence againſt the Debitors, though Payment be not made?

S. A Creditor being confirmed Executor, but dying before the Teſtament be execute, his neareſt of Kin cannot be confirmed *ad non executa*; but his Succeſſors in the Right of the Debt muſt take a new Courſe *quoad* the Debitor's Goods not execute, which may be indeed to confirm ſtill *ad non executa*, but then, they muſt firſt have the Right of the Debt eſtabliſhed for a Title in their Perſon; and yet in a Competition, this Confirmation, tho' fruſtrate in the Execution, ſhould be conſidered as a Step of Diligence, and be judged *ex poſt facto*, as if the Creditor deceaſing *adierat*.

The Caſe of Three Creditors being confirmed for their reſpective Debts, and one of them deceaſing before Sentence; ſhould be more diſtinctly ſtated, *viz.* Whether they confirmed each for himſelf, ſeparately: Or, one as Aſſigny by the other Two, for all: For, in this *laſt* Caſe, the Aſſigny will ſtill proſecute the Diligence. But in the *former* Caſe, if one deceaſes, there is no Reaſon that the Office and Benefit

ſhould

compel him to make his own Choice, tho it be more reasonable, to judge it extinct by his getting Payment.

That a *Tailzie* is executed by *Sentence*, tho' Payment be not obtained, is the common Opinion.

Executor Nominate.

N. IF an Executor nominate be liable as a Tutor; not only for what is confirmed, but what he might have confirmed and intromitted with?

S. An Executor nominate having *accepted* the Trust; it is reasonable, that he discharge himself by a due Diligence.

Executory.

N. WHETHER *universitas bonorum*, That is an illiquid Right; though the Subject consist of Moveables as a single Effeat, Conquest, Society as to a Trade or Shipping; will fall under Executry? If Casualities of Ward, Liferent Effeat, Non-entry, Marriage, will fall under the same? Or to the Superior's Heir?

S. It is thought, that *single Effeat*, and *Society in Trade*, which regularly, do only comprehend Moveables, will fall under Executry, so as the Executor may prosecute the same; tho' 'tis like it must be upon a License, rather than a Confirmation; where the Subject is *illiquid*. But as to *Conquest*, it may comprehend Heritage, tho' none appear: And therefore, whether the *Title* for prosecuting Conquest, should be as *Heir*, or as *Executor*, may well be doubted: I would incline to the *former*. But to clear the Case further, There is a Clause of Conquest in Favours of the Heirs or Bairns of the Marriage. And 'tis thought, that if the Subject of the Conquest be all *moveable*, the Heirs or Bairns, if there be another Executor to the Defunct, may pursue him to make the Conquest good, upon the bare Title of *Heirs or Bairns*, without either serving or confirming. But if there be no other Executor to be pursued, they must be decerned Executors, and so prosecute the Subject. But if there be *Lands* and *Heritages* in the Conquest, they must be *Heirs of Conquest*, unless there be a *general Heir*, whom they may pursue to make good the Conquest to them: And yet their *Title* in this Pursuit, must still be as *Heirs of Conquest*: For the simple Name and Title of *Heirs or Bairns* would not serve in this Matter, where there are Lands.

The Right of *Ward*, or of *Liferent-Effeat*, or of *Nonentry*, will, no Doubt, fall to the Superior's *Heir*, as to Terms to come: But *Bygones* due on these Rights, should fall to the Superior's *Executors*. But as to the *Marriage*, if it be not *declared*, 'tis thought it will fall to the Heir, as a *Pertinent* of the Superiority. But if it be declared, and a liquid

Heirs discerned, [illegible] all to the Executors; [illegible] Security, if he *decease first*. [illegible] in the same Manner, bygone Annualrents due by an Infeftment of Annualrent, will fall to the Executors; albeit these Annualrents be *debitum fundi*, and the Ground may be poinded for them. For 'tis not the *Execution* that determines the Question, If a Debt be heritable or moveable? But the *Constitution*, which, in the Case of Marriage, is *The Decreet for the Annualrent*; as in the Case of bygone Annualrents, it is The *Obligement* to pay the same.

N. There being a Bargain of Lands, *in mediis finibus contractûs vel Dispositionis*, Will the Price belong to the Heir who must perfect the Bargain? Answer, It is thought, not; seeing the Price is a moveable Sum: And it appears, that the Defunct having sold the Lands, had Use for it, and did intend to uplift it.

S. If the Contract or Disposition bear the Price to be *payed*, then the Bond or Security taken for it, will fall to the Executor, unless it be heritably conceiv'd: But if the Disposition bear for such a Price *to be* payed; or, an Obligement *to pay* it, as in a Contract; it may be thought, that if there be any Thing to be done by the *Heir*, by Reason that the Defunct was not totally denuded, the Price should belong to him; for it were hard to *compel* the *Heir* to complete a Bargain, and yet not to give him the *Price*. But if the Bargain were by Way of *Contract*, and on the *one Part*, a direct obligement to pay the Price to the other Party his Heirs or Executors; for which Cause, and on the *other Part*, to dispone the Lands, and grant *Procuratories, Charters and Precepts*: It may be thought, that the Obligement for the Price being Personal, and to *Executors*, as well as *Heirs*, should fall to the Executors: Albeit the Heir of the *Disponer* may still be obliged to grant the *Procuratories* and *Precepts* that were not granted by his Predecessor: Just as on the other Hand, the Purchaser dying, his *Executors* would be liable for the Price: Albeit his *Heir* only could have the *Benefit* of the Purchase. And yet if the Bargain were by way of Disposition for a certain Price to be paid; I incline still to think the Heir of the *Disponer* could not be compelled to perfect the Bargain; *that is*, To grant either *Procuratories* or *Precepts*, unless the Price were paid to *him*.

N. Whether a Gift of single Escheat will fall under Executry, or belong to the Heir? *Ratio Dubitandi*, That the Escheat is *jus Universitatis*; and nothing is in use to be confirmed, but either particular Moveables or Debts; and Plenishing estimate *in cumulo*.

Item, Whether a Gift of Liferent-Escheat (which, as to the Donatar, is a moveable Interest) will fall under Executry? *Ratio Dubitandi*, As in the former: And likewise, that during the Liferenter's Lifetime it cannot be construed what it will amount to: And it has *Tractum futuri temporis*.

The same Question may be as to a Tack assigned.

S. It is already *answered*, That a Gift of *single Escheat*, seeing it contains only *moveable* Goods or Debts, will fall under *Executory*.

As for a Gift of *Liferent-Escheat*, Tho' it would fall under the Donatar's simple Escheat, and so should much more fall under Executory; yet the *tractus temporis* that it includes, may make some Scruple: But since the same occurs in Tacks, assigned or not assigned, and in a Liferent assigned, which may all fall under simple Escheat; It were

were hard to say that they do not fall under *Executory*. But this needs a farther Clearing; for the Executory seems *broader* than a simple Escheat.

N. Whether the Heir, who has Right to a going Coal, will have Right to Buckets, Chains, and other Instruments, as being *accessoria* and *Destination* addicted to the Coal, as the Colliers: Or if they will fall under Executry?

A Person being about the building of an House; and the samen being begun, and certain Materials (as Stone, Lime, Slates and others) being prepared to that Use: Whether will they belong to the Heir (for the Reason foresaid) or fall under Executry?

S. The *Heir* has Right to a *going Coal*, and so the *Buckets*, *Chains*, and all other accceſſory Instruments, will belong to *him*, and not to the Executors.

The Materials for building of a House, if the Work was *begun*, should belong to the Heir; for so they seem to be destined. But if the Building were *not begun*, the Man might have changed his Mind, and his Executors would have the better Claim to the Materials.

N. A Daughter having accepted her Tocher and Provision by Contract of Marriage, *in Satisfaction of what might fall to her either by her Father or Mother's Decease*; the Contract of Marriage being after her Mother's Decease: *Quæritur*, If another Sister will have the Mother's Part entire, without Respect to her Sister's Interest being renounced, as said is? *Ratio Dubitandi*, That the Father, who is liable for his Wife's Third, is in Effect discharged as to his other Daughters Part of the samen: And on the other Part, the Mother's Part belonging to her Children, *non jure Legitimo* as Bairns, but as Executors and representing her: If any of them decease before Confirmation, or be unwilling to confirm; their Renunciation will be ineffectual, as by a Person not having Right.

Quæritur, If the Sister, who is not excluded, should confirm: If the Sister, who is excluded (as said is) may at least have Action against her for her Part of the Mother's Part; to the Effect, that the Discharge in Favours of her Father may be effectual? *It is answered*, That unless she be confirmed her self, she can have no Part of that which belonged to her Mother: And albeit by the Act of Parliament anent Executors nominate, the neareſt of Kin has Action for the Superplus of the Dead's Part exceeding the Third; that is only in the Case thereinmentioned, the said Act giving *Condictionem ex lege* in that Case only: Whereas that Act doth not militate in other Cases, where there is no Legitime, but only an Interest to represent; which cannot be effectual *sine Aditione*: Confirmation being in effect *Aditio in mobilibus*.

Quæritur, If a moveable Escheat will belong to the Executor, seeing Moveables belong to the Executor; and moveable Sums, and other Moveables fall under the same? Answer, It is thought, that Escheat being *Jus Universitatis*, should belong to the Heir: Seeing not only *mobilia* do fall under the same, but also such Rights and Interests as cannot belong to an Executor, as Tacks if they be not Liferent Tacks: And it is the Stile of Gifts, that the Escheat should be holden of his Majesty; which does not quadrate, and is not proper to be said of such Things as belong to the Executor.

§ A Daughter in her Contract of Marriage renounces all Right of her Father's Succession, in Satisfaction of all things fall to her, coming by her Father or Mother, who shall first ceaſe, and the Mother is already deceaſed; *whether will this Daughter's Renunciation, Share of the Mother's Part, fall to her other Siſters entire, or shall the Father repaid it?* And it appears more reaſonable that the Father, in this Caſe, be held as diſcharged of it: for that the Siſters cannot claim it, unleſs as it reciprocates, any may again fall within his Executory.

But the Siſter not excluded, confirms as neareſt of Kin to her Mother; for Bairn's Part *ex forma noviss* there is none: *Queritur*, If the Siſter excluded by her Contract, or her Father in her Name, may have Action againſt her, for *her* Part of the Mother's Part, that ſo her Diſcharge to her Father may be effectual? And it is true, the Siſter excluded muſt firſt be underſtood to be confirmed before ſhe can have Right to any Part of what belonged to her Mother, but ſeeing the Father might have confirmed or may confirm for this Daughter *renouncing*, this ſhould be held as done to make the Renunciation *valid*. For this is material Juſtice in ſuch Caſe, without amuſing with Subtilities. But what the *Author* ſays here, that the Act of Parliament 1617 anent Strangers, Executors nominate doth not militate in the Caſe where there is no *Legitime*, ſeems to be a *Miſtake*: For, wherever there is a Dead's Part, a Stranger Executor nominate, can only have the *Third*, tho' there be no Legitime, as in all Teſtaments of *Wives*; and alſo in the *Man's* Teſtament, when no *Bairns*, and *bipartite*. And if the *Teſtator* have neither *Wife* nor *Bairns*, a Stranger nominate Executor might think all the Dead's Part his own, and ſo claim the *Third* in the Terms of the Act. But 'tis certain, that if the Teſtament were *exhauſted* by Legacies, he would fall nothing. And it may be thought that therefore where there are no *Legatries*, he ſhould be reckoned *Hæres in mobilibus*. And yet to judge thus to the Excluſion of the neareſt of Kin were certainly a Hardſhip, and muſt remain to be *decided*; for the Act makes him accountable not only to the Defunct's Wife and Bairns, but alſo to the neareſt of Kin.

The Author judges, That ſhort Tacks, *that is*, not Liferent Tacks, tho' they fall under ſingle Eſcheat, yet do not fall to an Executor. And this may be extended to a Liferent-Eſcheat in the Perſon of a Donatar or Aſſigny; and to any Thing that has *Tractum futuri temporis*. But this may well be doubted. And notwithſtanding, 'tis thought, That a moveable Eſcheat will fall to the Executor. And for the Stile, bearing that the Eſcheat ſhould be holden of *his Majeſty*, it is *but* Stile, and ſignifies nothing. Here it may be further conſidered, *Whether ſhort Tacks*, that is, *not Liferent, do fall to the Executor, or to the Heir?* For commonly the Diſtinction is made, That tho' theſe *ſhort* Tacks fall under ſingle Eſcheat; yet they fall not to the Executor, but to the Heir. But *Firſt*, The Act of Parliament 1617, is no Ground for this, but rather for the Contrary: For what falls under ſingle Eſcheat, ſhould *multo magis* fall under the Executry. *Secondly*, That theſe Tacks have *Tractum temporis*, ſignifies as little: For a Bond bearing Annualrent has *Tractum temporis*, yet it is moveable *now* by Act of Parliament. But yet an Office for Life, as of a Clerkſhip, a Husband's *jus mariti* including the Wife's Liferent-Right, and a Liferent-Eſcheat of a Vaſſal fallen to a Superior before he be denounced, do *all* fall under ſingle Eſcheat, tho' they have *tractum temporis*: And, if for this they fall not under the Executry, the Reaſon of the Diſparity remains yet to be cleared. As for Nineteen Years Tacks, it is aboveſaid, That they may be equiparate to Liferent-Tacks.

Extent.

Extent.

N. IF the Inquest ordained to Extend, when there were former Returns upon a Commission to Extend?

S. It is thought, That Inquests do often Extend Lands without a former Warrant, and by mere Conjecture; Yet it is never quarrelled.

Extinction of Rights.

N. IF the Heritor of *Prædium dominans* acquire the Right of *Prædium ſerviens*, Whether doth the Right of Servitude extinguish, *quia rei ſuæ nemini ſervit*; ſo that if he ſell the *Dominant*, the Servitude doth not revive?

If the Heritor of Land acquire a Right of Annualrent out of the ſame; Whether or not is the ſaid Right of Annualrent extinguiſhed, or ſuſpended only; ſo that it may revive, if the Right of Property be taken away by Reduction?

S. The Rule, *Rei ſuæ nemini ſervit*, doth not generally hold: For, I have Right to a Mill, whereof *the Lead* or *Aqueduct* lies through other Lands, which are *Prædium ſerviens*: Now, I acquire theſe Lands; and yet if I afterwards ſell the Mill, tho' I ſhould expreſs no more, the *Aqueduct* will go with it; and ſo the Servitude revives.

And if an Heritor of Land acquire an Annualrent out of the ſame; tho' his Right of Property ſhould be reduc'd; yet the Right of Annualrent will ſtill remain. But if he ſhould voluntarily diſpone the Right of Property, the *Annualrent* would not revive, unleſs it were expreſly reſerved.

F.

Faculty to alter.

N. LANDS being diſponed, with Power to alter, without theſe Words, *Etiam in Lecto*; If that Faculty may be uſed *in Lecto*?

A Perſon having reſerved a Power to alter *in Lecto*, May he then uſe that Power, in Favours of any other Perſon than his Heir; ſeeing he is not *in legitima poteſtate* as to the diſponing an heritable Intereſt: And on the other Part, the Heir has no Prejudice?

S. When a Man diſponer Lands, with Power *to alter* at any Time in his Life; but does not add, *in Lecto*: The Time of his *Life* ſhould be civilly underſtood, of his *leige pouſtie*, if the Diſpoſition be to his

A Man having reserved a Power to himself, or his, may exercise this Power in Favours of whom he pleases, [illegible] to the Prejudice of the Reserver, or his Successors. But [illegible] Condition: And the Heir hath a Preference also [illegible] of the Heir.

Faculty to dispone.

N. BY a Writ granted by the Earl of *Callender*, to his Lady, he gives her Power to dispose of the Half of his Estate: *Quæritur*, The said Power being Personal, without mention of her Heirs, she not having used the said Faculty; If the said Power be Transmissible? *Found by the Lords*, That the Earl of *Dunfermling*, as Heir to his Mother, had Right thereto: And he having assigned the same to his Son, he recovered thereupon the Half of the Estate. *To see the Decreet.*

S. THE Earl of *Callender* gave Power to his Lady, (without mentioning her *Heirs*, (I think it was in their Contract of Marriage) to dispose of the Half of the Lands he should conquish: But this Power she never used; yet the Lords found, That the Earl of *Dunfermling*, as Heir to his Mother, had Right thereto; and the Earl's Son, as Assignay by his Father, did thereupon recover the Half of the Estate; Which I ever judged *hard*: For, since he gave his Lady only a *Faculty*, it certainly differed from the *Right*; and being given to her personally, if it was not exerced, it should have failed with her. And if a Man should now dispone Lands to another, reserving a Faculty to himself; this *reserved Faculty*, if not exerced, would die with him. But there is a full Decreet in the Matter where the Dispute may be seen.

Jus Facultatis.

S. THIS and the Two following Titles, *Quæ Facultatis sint, Quo modo intelligendum Facultati non præscribi*; are only Citations.

Personal Faculty.

N. A Person giving a qualified Right, reserving Liferent and Power to dispone: *Quæritur*, If that Faculty may be comprised as a Personal Reversion?

S. IF a Creditor should thereafter comprise the Lands so disponed, he would carry them by vertue of the Faculty; and yet if the Disponer did never *exerce*, the Disposition would stand good.

Faculty reserved to dispone.

N. IT being ordinary that a Power is reserved by those who dispone Lands, especially to their Friends, to redeem or dispone to [illegible]

Lands in [illegible] and Relief. [illegible] Faculty is upon the [illegible] which cannot be executed [illegible] And there is no Person that has the Right established in his Person, so that it may be resigned.

Item, If the Lands be in Non-entry and Ward, will the Resignation by vertue of the said Faculty determine and put an End to the foresaid Casualities in Prejudice of the Superior? *Ratio Dubitandi*. The Defunct by whose Decease they accrue was the Superior's Vassal; And though the Disponer has the same Power, yet he should have used it *debito tempore*, On the other Part, the said Power is of the Nature of a Regress, so that *quocunque tempore* (as in the Case of Regress) the entry may be desired by vertue of the said Faculty.

A Charter being to be granted to a Person conform to the said Power; That Clause, *Quæ quidem pertinuerunt*, what way it is to be conceived; and if Mention should not be made of the Person who is infeft for the present, though he be not the Person to whom the Right was disponed with the said Power; but either an Heir or singular Successor?

If the Faculty to dispone be not upon the Matter a Reversion, materially and as to the Effect of the same; so that the Person having the same, may dispone albeit he has not *jus in re*: And albeit the Heritor be either dead or forefaulted; as an Order may be used against an Appearand Heir, or against the King or his Donatar, in the Case of Forfaulture or *ultimus Hæres*?

A Person who had the Faculty foresaid, having by vertue thereof Disponed, but deceasing before Resignation, *Quæritur*, What way the Disposition shall be made effectual, seeing the Faculty was personal to himself?

5. It is already said, Tit. *Faculty to alter*, That a Power reserved to alter and dispone during *Life*, should be understood *in favore possessionis*, and not extended to *Lectus ægritudinis*: But with the Distinction there marked.

If the Receiver of a Disposition be dead, and the Lands thereby in Nonentry, the *Author* doubts, if the Disponer may notwithstanding exerce the said Power; because it may be understood as a Commission, and so expire by the foresaid Death. But that is but a Subtility, it being a *reserved Power*, and no Commission. And for what he adds, That the Disponer hath not Right in his Person whereupon he may resign; The reserved Faculty supplies it; and therefore it may be well exerced after the said Death.

And if the Lands be in *Nonentry* or *Ward* by the said Death; yet the Exercise of the Faculty by the Disponer must put an End to *both*. For when the Superior accepted the Resignation on the Disposition, he accepted it with the said Reserve, and therefore cannot complain.

As to the Charter to be granted in the Exercise of the said Faculty; And how the Clause, *Quæ quidem terræ per prius pertinuerunt*, should be conceived: 'Tis thought, just as the Matter of Fact is; whether the Person to whom they were first disponed be Infeft in the Right, or his Heir, or singular Successor: But the Faculty should, no Doubt, be expressly mentioned.

by a Precept out of the Chancery, if he could not be infeft by Vertue of the Procuratory or Precept in the Diſpoſition upon the reſerved Faculty, as now he may the Diſponer were dead.

Fee.

WHEN by a Contract of Marriage a Sum is to be provided to Husband and Wife in Liferent, and to the Bairns in Fee; which failzieing, to the Father and his Heirs: *Queritur*, Before there be Children where is the Fee? And, If it be not fit to take it to the Father to the Uſe and Behoof of his Children; which failzieing, to himſelf and his Heirs?

WHEN it is intended, that by Contract of Marriage the Parents ſhould be only Liferenters, and that certain Sums ſhould be provided to the Children, ſo that they do not repreſent them: *Queritur*, What Way the Fee can be provided to the Children that are not in Being? ANSWER. The Father may be infeft in Liferent for himſelf, and in Fee for the Uſe and Behoof of his eldeſt Son and his Heirs: Which Fee is to be to the Father and his Heirs, to the Uſe foreſaid: And they are to be obliged, upon the Exiſtence of a Son, to denude in Favours of him and his Heirs.

BY a Contract of Marriage betwixt *Knockdow*, Sir *John Kennedy* and *Gilbert Kennedy* of *Girvanmayns*, the ſaid Sir *John* having married the ſaid *Gilbert*'s Daughter; the ſaid *Gilbert*'s Lands and Eſtate are diſponed to the ſaid Sir *John* and his ſaid Spouſe, and the Heirs betwixt them? which failzieing, to ſuch of the ſaid *Gilbert*'s other Daughters as he ſhould at any Time appoint; which failzieing, to the ſaid Sir *John*'s Heirs and Aſſignies whatſomever: And now the ſaid Sir *John* being deceaſed, and having a Son of the Marriage: *Queritur*, Whether the Fee did belong to him, ſo that his Son may be ſerved Heir to him in the Eſtate? *It is anſwered*, That in the Caſe of the Duke and Dutcheſs of *Monmouth*, the Conception of the Tailzie not being unlike, it was thought the Dutcheſs was Fiar; albeit the Limitation of the Fee did ultimately reſolve in the Duke's Heirs, upon that Ground, that there is a Difference betwixt the Caſe where the Lands are provided and diſponed to the Husband and the Wife, and the Heirs of Marriage; which failzieing, either to the Husband's Heirs, or Wife's Heirs: And in the Caſe foreſaid, where, after the Heirs of the Marriage, there are diverſe Subſtitutions in Favours of the Wife's other Heirs; and after all, in Favours of the Husband's Heirs. In the firſt, if the Wife's Heirs do only ſubſtitute failzieing Heirs of the Marriage, the Husband is underſtood to be Fiar; becauſe, as it is the Eſſence of a Fee to have Power to diſpone, and if the Fiar do not diſpone, to tranſmit to the Heirs, and to be repreſented by them: And *in dubio caſus hæres maxime proſpicitur*, that Perſon is thought to be Fiar. But in the

ver, as ſaid is, [illegible] where[illegible] there is a Liferent [illegible] Part of
rent ſettled on the Husband, where[illegible] there is a Liferent [illegible] Part of
the Lands given to his Wife, in Satisfaction of what might fall to her
either of her Father's Eſtate, or of her Husband's [illegible] there is a
Proviſion, That if there ſhould be no Children of the Marriage to ſuc-
ceed to that Eſtate, the Husband ſhould be obliged in that Caſe, he and
his Heirs, to denude themſelves upon Payment of a certain Sum of
Money; and he could not denude himſelf unleſs he were Fiar. So that
it was intended, that the Husband ſhould be Fiar, but with the fore-
ſaid Proviſion to denude in the Caſe foreſaid, and to be reſtricted to a
Tocher. For which, and other Reaſons ariſing upon the Contract, the
Antecedent is and *Conſequent* being conſidered, it is thought, that the
Son ſhould be Heir to his Father as Fiar.

A Bond being granted to a Man and his Wife, and their Heirs: *Quæ-
ritur*, What Right the Wife will have to the Sum? *Ratio Dubitandi*
That there being no Mention that the Sum ſhould be due to the long-
eſt Liver, and the Heirs of the longeſt Liver; but to them both and
their Heirs; it appears, that the Heirs ſhould be underſtood the Hus-
band's Heirs as *Perſonæ digniores*. ANSWER, It is thought, That ſee-
ing there is a joint Right to the Husband and the Wife, and it is the
Cuſtom of Perſons of their Quality, being mean Country Perſons, that
the longeſt Liver ſhould enjoy all; the Wife *indubie* ſhould enjoy the
Hail in Liferent, and ſhould have the Fee of the Half.

§. It is thought, The *Fee of a Sum* provided by Contract of Mar-
riage to the Husband and Wife in Liferent, and to the Bairns in Fee,
which failzieing to the Husband's Heirs; is in the *Husband*'s Perſon:
And, if it be in his Perſon before there be Children, it muſt continue
even after their Exiſtence; for in effect theſe Words are but Words of
Stile; and the Thing deſigned is a Conjunct-Fee to the Husband and
Wife, and then to the Bairns of the Marriage.

If it were intended by Contract of Marriage, that the Father and
Mother ſhould be only Liferenters, and that the Fee ſhould belong to
the Children without repreſenting: The Author thinks, the Father may
be inveſt in Liferent for himſelf, and in Fee for the Uſe and Behoof of
the Heirs or Bairns; and, that upon the Exiſtence of a Son he would
be obliged to denude. But it were certainly better, that the Fee of
either Land or Money in this Caſe ſhould be ſettled upon another Tru-
ſtee in Favours of the Heirs and Bairns.

If Lands be diſponed to a Man and his Wife in Conjunct-Fee, and
the Heirs betwixt them; which failzieing, to the Man's Heirs or to his
Wife's Heirs: It is ordinarly thought, That this laſt Termination, whe-
ther upon the Man of upon the Wife, determines the Fee; becauſe *e-
jus hæredibus maxime proſpicitur*: And yet the Author ſeems here to
ſay otherways, but it muſt be a Miſtake. And if there be after Subſti-
tutions, and the Fee once ſettled, the after Subſtitutions will be con-
ſtrued Heirs of Proviſion accordingly. But in this Caſe of *Girvanmains*,
the Fee was thought to be in the Perſon of Sir *John*: And, 'tis true,
that

[illegible] for the Wife and [illegible] in the Case [illegible] for [illegible] the Lands [illegible] which was the Occasion of the Doubt. But there it was to be [illegible] and there was no Interest [illegible] Sir John the Husband; but there was a Liferent of a Part of the Lands provided to the Wife, in Satisfaction of what might fall to her either of her Father's or Husband's Estate; and there was also a Provision, That in case of no Children of the Marriage succeeding, the Husband and his Heirs should be obliged to denude upon Payment of a certain Sum. All which Specialities did move the Lords to judge, that Sir John was in the Fee. And the Point principally to be observed here, is, That a Conjunct-Fee being undetermined of itself, as to the Man or as to the Wife, seems in our Law to be determinable by the stronger Presumptions which here made for Sir John: Yet, if there had been no Heirs of the Marriage, the Case had been more doubtful; specially, if the Wife had first deceased, and the Father named another Daughter.

When a Bond is granted to a Man and his Wife and their Heirs, being a simple Bond, and not mentioning the longest Liver; the Author thinks, that it makes a joint Right to the Husband and the Wife; and that the longest Liver should enjoy all: And therefore gives the Wife surviving, the Liferent of the Half, and the Fee of the Half. And yet, if there were a Son procreate betwixt them; he, by a general Service to his Father, would carry the whole Right of Fee, as our Pratique runs. But, what if the Bond were conceived to the longest Liver and the Heirs of the longest Liver in Fee; Which, the Man, of the Wife, would be thought Fiar during their joint Life? And, I would judge for the Man; for, the Fee should not be *in pendente*: And he is also the *Husband*, and should have the Administration; and the Heirs of the Wife, the longest Liver, would be Heirs of Provision to the Man.

De Feodo Pecuniæ & Nominum.

N. "PECUNIÆ & Nominum nec proprie Ususfructus nec Feodum
" est; ususfructus enim definitur, Jus utendi fruendi, salvâ re-
" rum substantia: pecunia autem sive in specie, sive in nominibus est res
" fluxa: Et si in specie sit, facile diffluit & usu consumitur: Nomina au-
" tem, etsi initio idonea, debitoribus decoquentibus, inania sunt. Quem-
" admodum vero ob utilitatem receptum est, ut pecuniæ sit quasi usus;
" ita est quasi feodum: istud enim, proprie loquendo, est tantum in re-
" bus soli & stabilibus, & feudis tantum; non vero allodialibus (ita dictis
" quod nullo laudato & recognito alio domino, ad proprietarium perti-
" nent pleno & integro jure nec libato & diviso in dominium directum
" & utile. Licet autem apud alias gentes prædia quædam allodialia sint,
" nobis omnia sunt feudalia.) Et feodum quidem in feudis de proprieta-
" te & dominio dicitur, prout distinguitur ab usu fructu; & alias quan-
" circa feuda versantur juribus. Per metaphoram tamen feodum transfe-
" fertur ad pecunias & nomina, ita ut is in feodo esse dicatur, cui jus

fum-

" [illegible] per [illegible] fic [illegible] minutis feodum.

" *Quæſt. 1ma.* Si igitur *Sempronius Petro* pecuniam ſe debere [illegible] rographo ſtipulatus ſit, eam & uſuras ſibi ſolvi ſi ſuperſes ſit; eo autem " per obitum deficiente, *Titio* filio ſuo & *Titii* hæredibus, & quibus de- " derit, ſeu aſſignatis: Ita tamen ut *Sempronio* liceat de pecunia & No- " mine diſponere *Titio* & hæredibus ejus inconſultis nec conſentienti- " bus; *Quæritur*, In illa facti ſpecie ad quem nomine illius feodum per- " tineat? Et videri poſſit feodum ad *Titium* filium pertinere, cum nulla " ſit mentio *Sempronii* hæredum. Et feodi ea ſit natura, ut ad hæredem " tranſeat, qui in jure eadem perſona conſtetur. Dicendum tamen *Sem-* " *pronium* in feodo eſſe; penes *Titium* verò & ejus hæredes, ſpem & " jus Succeſſionis. Nam quæ feodi & proprietatis vel eſſentialia vel na- " turalia ſunt (ut *ſcil.* Dominus de re ſua diſponere & ut ea ad hæredes " tranſeat) ea *Sempronio* competunt; poteſtas enim diſponendi etiam non " expreſſa ineſſet; & *Titius Sempronio* ſubſtitutus in jus ejus ſuccedit, " & pro hærede habetur (provisionis fabem, ut loquuntur) idque ex eo " eluceſcit, quod ſi acceſſiſſet etiam hypotheca & fatina, terris pro pe- " cunia in hypothecam datis, iiſdem conceptis verbis, *Sempronio* fact. & " eo deficiente, *Titio* filio & ejus hæredibus & aſſignatis: *Titius* eo ca- " ſu, extra omnem quæſtionis aleam hæres foret: ubi autem eadem ſunt " verba & eadem ratio, idem jus eſt & eſſe debet.

" *Quæſt. 2da.* In iſtu facti ſpecie ſupra memorata, *Quæritur* etiam an *Sem-* " *pronius* de iſto nomine diſponere poſſit, nedum inter vivos, ſed Teſta- " mento aut codicillis eo legato; cum debitum chyrographiarium & mo- " bile ſit?

" *Reſpondendum* videtur, *Sempronium*, eo ipſo quod tam hæredibus " quam executoribus præteritis, *Titium* elegit & ſubſtituit ſibi, inſtar hæ- " redis proviſionis, & interciſo ordinario ſuccedendi ordine, quaſi Tallia; " *Titium* in ea re hæredem eſſe voluit: voluiſſe etiam nomen eſſe hære- " ditarium, de quo moribus noſtris niſi inter vivos non licet diſponere; " nec de ea re eſt teſtamenti factio: Nec ad hæredem inſtitutum in mo- " bilibus ſeu executorem nominatum pertinet, quod ab inteſtato ad Ex- " ecutorem dativum non pertineret.

" *Quæſt. 3tia.* In iſta etiam ſpecie *Quæritur*, Si chirographum in actorum " codicem ſeu Regeſtum (ſive ut loquimur, Regiſtrum) referatur, vel a " *Sempronio* vel eo mortuo *Titio*, ut inſtar ſententiæ habeatur, & ex eo ſit " executio parata: An eo caſu *Titio* executio competat; ita ut Literis Exe- " cutorialibus & Cornoationis (ut loquimur) impetratis, debitori manda- " ri poſſit ut *Titio* ſolvat ſub pœna Rebellionis: Et comminatione ni pa- " reat, eum Exlegem & Rebellem denunciatum iri?

" *Reſpondetur*, *Titio* actionem quidem competere adverſus debitorem, " non executionem ſummariam, cum non ſit Creditor primarius & ab " initio, ſed jure ſucceſſionis ut ſubſtitutus & hæres tallie aut proviſio- " nis. Hæredi ſiquidem ex chirographo nunquam executio ſummaria " competit, niſi a deceſſore in acta relatum & poſt ejus obitum in hære- " dem tranſlatum ſit; vel hærede agente per viam actionis in acta refe- " ratur, de ea re ſententia ſequatur.

" [illegible]
" [illegible]
" ræ & [illegible] [illegible] [illegible] forte [illegible]
" corrueret; si constiterit *Titium* haud rite processisse, cum ea
" ria executio haud competeret; adeo multum est bene coepisse: Sub-
" lato enim fundamento superstructa corruunt, & parta sunt in jure non
" *fieri, & non rite fieri.*

" *Quæst. 4ta.* In specie supradicta Respondimus nomen in persona
" *Sempronii* primarii creditoris hæreditarium: Superest tamen adhuc scru-
" pulus & quæstio, an in persona *Titii* substituti sit etiam hæreditarium,
" an vero ut mobile ad executores *Titii* pertineat? Sed
" *Respondetur*, Nomen etiam quoad *Titium* hæreditarium esse: ab-
" surdum enim foret, partim hæreditarium partim mobile esse: & cum
" ab initio hæreditarium sit non desinit esse hæreditarium; nisi credi-
" tor, vel substitutus facto aliquo declaret naturam nominis innovatam
" velle; literis forte impetratis & debitore jusso solvere sub pœna Rebel-
" lionis.

" *Quæst. 5ta.* In illa facti specie superius memorata, cum essent quinque rei
" debendi in solidum, uno ex iis defuncto, *Sempronius* Creditor de eadem
" pecuniæ summa sibi dari curaverat ab hærede ejus syngraphain seu o-
" bligationem corroborationis; sic dictam quod priore obligatione salva,
" ad eam ut accessoria & auxiliaris accedat eamque corroboret: eaque
" obligatione stipulatus fuerat pecuniam sibi solvi, ipsoque per obitum
" deficiente, non *Titio* ejusque hæredibus in principali obligatione substi-
" tutis, sed *Gaio* ejusque hæredibus: *Quærebatur* igitur utrum post mor-
" tem *Sempronii*, pecunia ad hæredes *Titii* præmortui ex prima substi-
" tutione; an vero pertineat ad *Gaium* ex secunda?
" *Respondendum*, Videtur eam ad *Gaium* ejusque hæredes perti-
" nere: *Sempronius* enim facultate usus quam sibi reservaverat, & quæ
" etiam non expressa penes eum ut dominum & feudatarium fuisset, no-
" vissima substitutione priorem sustulerat: & licet Notarii imperitia aut
" oscitantia haud cautum sit pecuniam solvendam tam ex principali quam
" accessoria syngrapha *Gaio* & ejus hæredibus; id tamen jus supplet &
" subintelligit: posteriora siquidem derogant prioribus; nec possibile est
" ut idem jus sit in solidum penes plures & diversos Creditores; ad hæc
" in iis quæ sunt facultatis & arbitrii, voluntas posterior operatur & præ-
" valet utcunque expressa; & magis valet quod agitur quam quod con-
" cipitur.

" *Quæst. 6ta.* Haud dissimili ratione, si Debitum sit hæreditarium (hy-
" pothecarium *sciz.*) addito pacto de terrarum hypotheca; postea vero cre-
" ditor nova syngrapha in corroborationem accepta stipuletur pecuniam
" sibi & executoribus solvendam; statim nomen hæreditarium esse desi-
" nit: Licet enim posterior syngrapha sit in corroborationem & absque
" præjudicio prioris, ita ut ex utraque syngrapha pecunia debeatur &
" exigi possit; mutantur tamen nominis qualitates & accidentia extrinseca;
" ex principali siquidem obligatione hæreditarium; ex accessoria mobi-
" le est: nec interest Debitoris quos sibi velit Creditor hæredes aut exe-
" cutores aut substitutos; adeo ea de re voluntas creditoris ambulatoria
" est & novissima derogat præcedentibus.

" *Quæst.*

" *Reſp.* Utrobique, tam regia conſtitutione, quam illo ordinum ſtatu-
" endi conatu, agi tantum de eo nominum ſpecie quæ vulgaris & fre-
" quentior eſt: Cum *ſcil.* ita in creditum itur ut pecunia debeatur, &
" reddenda ſit creditori ejuſque hæredibus & executoribus; quo caſu
" ſancitur ea ad executores pertinere: in aliis verò caſibus, ubi ſingula-
" ris aliqua ratio obeſt, ſuadetque nomen nec creditorem voluiſſe nec
" poſſe ad executores pertinere: Lex iſta locum non habet. Et cum va-
" rii caſus nec de regula nec legis ſint, nec de iis cogitatum, eos omnes
" excipere nec neceſſe vix poſſibile erit. In comperto autem eſt *Sem-*
" *pronium* creditorem, cum *Titium* ejuſque hæredes ſibi ſubſtituerit, ex-
" ecutores excluſos voluiſſe. Et in genere, ubicunque pecunia (ut ita
" dicam) talliatur; & interciſo ordinario ſuccedendi ordine, hæredibus
" *Tallix*, aut proviſionis proſpicitur, nomen hæreditarium eſt; *e, g.* Si
" quis chirographum acceperit ſibi & hæredibus forte inter ipſum & ux-
" orem procreatis, quibus deficientibus hæredibus de corpore ſuo, qui-
" bus etiam deficientibus aliis proviſionis hæredibus; nemo, ut opinor,
" arbitrabitur nomen illud, quo conſulto tot hæredibus conſulitur, haud
" hæreditarium eſſe: licet in chirographo nec de executoribus ſubmo-
" vendis, nec de Inveſtitura aut ſaſina danda caveatur.

Quæſt. 9na. " Quod ſuperius dictum eſt, ſubſtitutum *Sempronio*, ei in jus
" nominis ſuccedere, & hæredem proviſionis eſſe. Sed de ea re ambigitur;
" & *Quæritur*, An *Sempronio* hæres eſſe poſſit, qui, eo defuncto, è veſti-
" gio agere poteſt adverſus debitores ex obligatione, etiam ſine alia adi-
" tione; licet ex Inquiſitione quindecemvirali (ut moris eſt) haud com-
" pertum & declaratum ſit, eum *Sempronio* in ea re hæredem eſſe: acce-
" dit quod hæres ſuccedit in univerſum jus, ſubſtitutus vero in illo nomi-

" quit nisi hæres sit: nec alio Titulo aut jure succedit sub-
" men ad Chirographarium tantum; quamvis alibi
" certum autem est vel Debitum hypothecarium
" futurum, titulo hæredis, nec aliter posse succedere; imo
" præmoriente, *Sempronio* substitutus hæres, jus nullum
" nisi *Sempronio* hæres sit; Et ex Inquisitione constitutum & declaratum
" eum esse hæredem.

" *Quæst.* 10. Morinus noster hæres nullum jus consequitur nisi he-
" reditatem adeat, sive ea sit in prædiis, sive in aliis rebus hæreditariis: In
" terris autem duo sunt modi adeundi, ut scil. a Superiore seu Dominio di-
" recto, vasallo defuncto, hæres agnoscatur & ejus jussu & sine pacto
" (quod *Clare Constat* dicitur) ut hæres investiatur: vel ex inquisitione
" Judicis ad quem ea res pertinet constet, & ab eo renunciatum illum
" esse hæredem, & Sasina secuta sit. In aliis verò rebus unicus adeun-
" di modus ex inquisitione, *scil.* Cum igitur in casu superiori, substitu-
" tus nulla prævia inquisitione secundum obitum *Sempronii*, statim & re-
" cte adversus debitorem agat, haud immeritò dubitatur, an *Sempronii*
" hæres sit? Sed,

" *Respondetur*, Illo casu aditionem haud deesse, imo necessariam esse;
" cum enim hæreditas aut opulenta aut damnosa sit; ut invito non detur
" beneficium, ita damnum & injuria non debet inferri; nec illo jure ni-
" si civili apud *Romanos*, hæres necessarius est; & apud eos unico tantum
" casu: substitutus autem ipso facto adit & hæres est, si debitum ut su-
" um petat & ex chirographo agat. Ideo autem solemni, ex institutione,
" adeundi modo haud opus est, cum ex chirographo cum *Sempronio* suc-
" cedere clare constat, nec in claris ulterius inquirere necesse sit.

" *Quæst.* 11*ma*. Ubi hypothecarium est & sasinâ vestitum: substitutus
" post obitum creditoris nec recte agit nec aliquid juris consequitur, nisi hæ-
" reditatem adeat, & a domino directe & sponte agnitus & sasitus sit, vel ex
" inquisitione jussu & mandato Regis investitus: *Quæritur* igitur, Quæ sit
" ratio discriminis, cum chirographarius substitutus, statim mortuo credi-
" tore, & jus habeat & debitum condicere possit: Hypothecarius verò
" non nisi adita hæreditate nec minus manifestum sit ex obligatione sub-
" stitutum succedere?

" *Resp.* Rationem differentiæ in promptu esse; In chirographario si-
" quidem debito cum jus personale tantum sit, & ex chirographo evidens
" sit substitutum succedere; ut substitutus adeat nulla alia formula opus
" est sed ex chirographo agendo; vel alio quovis actu jure suo agnito
" adisse censetur: Sin debitum hypothecarium sit, cum peries creditorem
" duplex sit jus, reale *scil.* per sasinam, & personale ex chirographo;
" quod reali (utpote potiori & nobiliori) semper accedit; neutrum tran-
" sit ad substitutum nisi adierit, & sasitus sit sasinâ a domino volente &
" sponte datâ, vel ex Inquisitione & Jussu & Mandato Regis. Cum igi-
" tur ut chirographarius succedat, unica voluntas substituti ejusque factum
" requiratur: In hypothecario verò tam voluntas & factum substituti ad-
" ire volentis, quam domini recti eum in vasallum recipientis: Ideo chi-
" rographarius, jus suum petendo, vel alio actu jus suum agnoscens, con-
" festim succedit; nec aliud agendum superest: in hypothecario verò,
" si dominus directus forte difficilior, substitutum recipere nequit vel

" cuncta-

" [illegible] in
" [illegible]
" [illegible]
" [illegible]

" fieri alia
" aliud esse
" posset &
" ro vix
" desit; obit vero
" si præmoriatur instituenti fratre adhuc superstite, qui ei hæres
" si eo quo instituens diem obiit tempore decessisset, instituenti hæres
" erit, nec fratris mors operienda erit, & tamen ei hæres nec
" esse potest qui instituenti succedit; ea ratione obstante quod adhuc
" superstes hæredem habere nequit, vel si fratris hæreditas integra & ex
" asse adita sit, adeo ut amplius hæredem habere nequeat; facultate de-
" undi per additionem absumpta; quia si frater cujus hæredes vocantur
" præmortuus sit sine liberis & perduellionis damnatus, instituente po-
" stea defuncto; si alius sit frater qui perduelli hæres foret si ad pacem
" & fidem Domini Regis decessisset, & instituenti hæres erit licet nec
" tro casu fratri nec habitu nec actu hæres esse posset obstante *scil.* non
" naturali relatione & sanguinis defectu, sed Jure & ratione civili, ob
" quas supra memoravimus causas.

" Quæ pro altera parte afferuntur, *viz.* quod ei quorundam sive do-
" mio sive error (& magis communis) suffragetur; & vulgo dicitur *er-*
" *ror communis jus faciat*, hisce præsertim rationibus submixus, *viz.* cum
" quis vocatur sub modo aut qualitate ut alteri hæres sit qualitatem ne-
" dum adesse sed præambulam antecedere oportere, nec instituenti hæ-
" redem esse posse nisi prius alteri cujus hæredes vocati sunt hæres sit;
" cumque *Hæres* nomen Juris sit non personæ, alterius hæredem non
" admittendum esse, nisi ex Inquisitione alteri hæredem esse compertum
" sit; ex Inquisitione autem alterius hæredem renunciari moribus nostris
" nihil aliud esse, quam alterius hæreditatem cernere, & actu adire. I-
" stæ inquam rationes facile diluuntur; nam cum patribus errasse utcum-
" que excusat, errore autem ratione evicto & agnito, nemo adhuc er-
" randum esse sentiet: Et communis error quando est *in facto*, & circa
" conditionem aut qualitatem personæ, ut quondam *Barbarii Philippi*;
" qui cum servus esset Prætor *Romanus* fuit; in isto & similibus casibus,
" vel si forte prælatus vel notarius haud legitimus pro legitimo tamen
" tentus & reputatus sit, hactenus communis error Jus facit ut quæ ab
" iis gesta sunt haud corruant: publica utilitate postulante ne publicus
" & communis error Reipublicæ noceat: Error autem *in Jure* non ex-
" cusat nedum Jus facit; & qualitas sub qua vocatur hæres alterius,
" haud deest si hæres sit habitu & proximus, ut superius demonstratum
" est. Denique qui Brevi Regis impetrato postulat ut judex inquiri
" faciat an hæres sit instituenti, ejusque tantum hæreditatem adit, licet
" alteri hæres sanguinis & habitu & esse & per inquisitores renunciari
" debeat.

" *Quæst.* 13. An eo ipso quod *Sempronii* hæreditatem adiret *Titii*
" hæres; etiam *Titii* hæreditatem adiisse videatur, cum *Titii* hæredes
" *Sempronio* substituti sint; adeo ut provisionis hæres *Sempronio* esse ne-
" queat nisi hæres *Titii* sit, *quærendum* est? Parum quidem interesse vi-
" detur utrum *Titio* hæres esse inquisitione, & postea *Sempronio* ex ea
inqui-

" [illegible] eadem
" [illegible] declaretur.
" [illegible] civiles actus
" [illegible] impetrato, in-
" [illegible] *Titii* hæreditatem adit: Id
" enim [illegible] ut *Titio* hæres sit: Verum ubi Brevi im-
" petrato, *de quibus constabit* inquirendum curat quis *Sempronio* hæres
" sit, & Claneo seu petitione exhibita petit ut declaretur se hæredem es-
" se *Sempronii* cum hæres proximus *Titii* sit, eo casu nec adiit nec ei pro-
" positum est ullam nisi *Sempronii* hæreditatem adeundi. An verò *Titii*
" sit hæres inquiritur tantum obiter, & tanquam de qualitate præambula;
" sine qua, *Sempronii* provisionis hæres esse non potest; non verò ut *Ti-*
" *tii* hæreditatem adeat, & ei hæres actu sit: sufficit enim, ut superius
" diximus, ut *Titio* hæres sit sanguinis & habitu: adeo in jure iidem
" actus ex animo & fine diverso plerumque diversos habent & sortium-
" tur effectus.

Quæst. 14. " NIHIL quidem a Religione judicantis magis alienum est quam
" Προσωποληψια ea divino & omni jure vetita ægre tamen vitatur; & quod
" de *Marte* & *Venere* & de *Vulcani* vinculis occultis sed tenacibus in fa-
" bulis est, verum est de affectibus animum impedientibus, ne verum &
" justum cernere possit; imo ubi lex & regula haud deest, interdum in-
" star *Lesbiæ*, colore aliquo eò torquetur, quò affectus impellit: Ubi
" autem lex aut regula deest, sibi homines lex sunt, ut ait Apostolus, sen-
" su multum diverso: & judicantis pro lege affectui gratificandi arbitri-
" um sibi permissum arbitrantur. Curandum itaque quantum fieri potest,
" ne arbitrio, legibus & justitiæ inviso, locus sit. Licet autem sit homo-
" nomia in ipso nomine *Hæredis*, & materia anceps & arbitraria; utrum
" hæres de eo qui est actu hæres, an de eo qui habitu & sanguinis hæ-
" res est tantum, intelligendum sit: Arbitrium tamen videtur istis regu-
" lis substringi & coerceri posse.

1mo. " Ubicunque alterius hæres ad alterius hæreditatem vocatur, sa-
" tis est eum alteri hæredem esse habitu; utque ei facultas & jus sit ad-
" eundi, si velit & prosit, non verò necessitas si nolit aut noceat.

2do. " TUM materia subjecta tum id quod agitur multum inspicitur:
" Inmateria igitur non successoria, ubi mentio fit hæredis, nec agitur ut
" succedat sed ad alium finem & effectum, intelligendus est semper hæ-
" res habitu, non actu; *e. g.* In tabulis nuptialibus seu contractu, quem
" matrimonialem dicimus, synalagma est, & mutua ultro citroque obli-
" gatio; sponso enim de dote; sponsæ de doario cavetur; & liberis de
" successione: quia verò obligatio sine actione & executione inanis esset,
" nec uxor nec liberi sub potestate & ferula mariti futuri, contra eum
" agere queunt; ideo clausula executiva introducta est, quâ cavetur, ut
" actio & executio competat necessariis quibusdam & eorum hæredibus,
" ad ea persequenda quæ uxori & liberis ex eo contractu debentur aut
" præstanda sunt. Eo casu si aliquis ex hæredibus egerit, ex ea clausula
" qua sibi non consulitur sed ob sanguinis & necessitudinis vinculum in
" aliorum rem officium & sollicitudo injungitur; nemo rationis compos
" nedum jurisprudens opinabitur, eum summovendum nisi actu hæres es-
" se velit; & hæreditati damnosæ se implicare, non obstante juris regu-
" la, *Officium nemini debere esse damnosum*. Haud aliter sentiendum eo
" casu quo decimæ (ut plerumque fieri solebat) ad longum tempus locan-
" tur, conductori ejusque hæredibus & assignatis; ita ut locatio duran-
" te vita conductoris, & secundum eum trium hæredum successive du-
" ratura & æquæva sit. Hæredes enim, cum quæritur quamdiu locatio

" [illegible]
" [illegible]
" [illegible]

Executors. [illegible] prefer him [illegible] but ſtill I muſt [illegible] ſtable? For [illegible] ſerve his Lands [illegible] that a Man did [illegible] Bond, he ſhould have no more [illegible] or teſtate upon it. [illegible] ſtitute, is not the Law [illegible] appears to me, more reaſonable, that Definitions ſhould ſo duly are intended, but not change [illegible] *this* Caſe, I hold the Bond to be [illegible] *vivos* and on Death-bed by *Sempronius*, yet ſo as *Titius* ſhould be preferred to all *other* Heirs or Executors [illegible] who ſucceed only by Law. And it may be thought, That *Sempronius* not diſpoſing, *Titius* ſhould ſucceed by virtue of the Bond immediately; and ſo he would in the *Firſt Caſe*. But, it may be, here would require a *general Service*; yet this Service ſhould not make *Titius* liable to Debt as Heir, but allenarly *ex facto*. But further, *Titius* ſucceeding and then dying, it may be thought, That the Sum ſhould not be accumulated to Executors as Heirs *in mobilibus*, and ſo be tranſmitted by Succeſſion, notwithſtanding it came to *Titius* by a Service. Theſe Things may be thought ſingular; but the Bond being moveable, is ſaid as is conſequent.

The Author, in his *Third* Queſtion, reſolves, That *Titius* ſucceeding as a Subſtitute, cannot change ſinmarly on the Bond. But now theſe Two are conſiſtent, by the Act. Parl. 1693.

In the *Fourth* Queſtion, the Author will have the Bond to be hereditary, becauſe of the Subſtitution; and not only so in the Perſon of *Sempronius*, but likewiſe in the Perſon of *Titius*. But this proceeds only on the Miſtake, as if there could not be a Subſtitution in moveables; and as if a Subſtitution, excluding indeed (but not expreſly) Executors, ſhould therefore make the Bond *Heritable*. Whereas Heritable and Moveable, ſhould firſt be defined by their proper Characters, and then the *Tranſmiſſion* ſhould be accommodate. For, it appears always reaſonable, that the *Manner* of the Tranſmiſſion ſhould change the *Nature* of the Thing. And I might it not juſtly appear abſurd, if *Titius* the Subſtitute having a good Land-Eſtate, and, it may be, nothing, at leaſt no Money, moveable, except the ſaid Bond; if the ſame ſhould tranſmit to his eldeſt Son and Heir, not to his younger Children?

The *Fifth* Queſtion on the ſame Bond is, Suppoſe *Sempronius* takes a Bond of Corroboration, whether from the ſame Debtor or a *Correus*, *perinde eſt*; if in the Bond of Corroboration he make the Subſtitution to *Gaius*. Then 'tis viſible, that he ſtrikes out *Titius*, as if he had aſ-

[illegible] Question, suppose the Bond to *Sempronius* to be [illegible] dinary by Infeftment, but the Bond of Corroboration to be [illegible] expressly to his Executors: And it appears thereby, that he made *Sempronius*'s Substitution, and the Executor confirming would be pos[illegible] sessed to the Sum; but yet he cannot have Right to the heritable Security in the first Bond, unless he, by way of Action, compel *Sempronius*'s Heir to denude in his favours, or at least adjudge from him.

The *Seventh* Question puts the Case, That *Sempronius* had several bound to him, and takes Corroboration from one of them only, and therein changes the Substitution to *Gaius*. *Gaius* may certainly have the Benefit of the first Security, either by pursuing all bound in it, or forcing, for Formality, the Heirs of *Titius*, his *first* Substitute, to assign him against them. But this is but a Formality.

In the *Eighth* Question, the Author takes Notice, That the Bond to *Sempronius* appears to be still *moveable*, according to the *Definition* of Heritable and Moveable Bonds, contained in the Acts of Parliament; and therefore moves a *Doubt*, Whether it should transmit to the Heirs of the Executors of the Substitute, *Titius*: And he thinks that because the Substitution of *Titius* to *Sempronius* makes it Heretable in his Opinion, therefore it should be Heretable in its Transmission from Titius to his Heirs, and not to his Executors, as this Case, tho' omitted, had been even defined by the Act of Parliament. But, all this appears to be *gratis dictum*, and the true Account of this Matter is above given in the *Fourth* Question.

The *Ninth* Question shews why *Titius* the substitute *nominatim* must be served to *Sempronius*, altho' he judges that it cannot make *Titius* farther liable as Heir, *nisi in quantum ei obvenit*. But where the Bond is simple, it is but from the Contagion of the *Feudal* Law, that a Service is required to transmit it to *Titius*, when expresly substitute, and though, if the Bond were hereditary by Infeftment in the Person of *Sempronius*, there might be some Reason why the *Real* Right could not transmit to *Titius*, tho' substitute, without a Service; for here, we must be *feudal*: yet even in other Cases a Personal Bond may more easily transmit than the same Bond made heretable by Infeftment. Thus in a *Clause of Conquest* where Money and Goods, and not Lands, are the only Subjects, the Bairns or Heirs of the Marriage are allowed to pursue even without a Service. But, passing this, Put the Case, That *Titius* die before *Sempronius*, then, even where the Bond is but simple and personal there appears more Reason that *Titius*'s Heir, since he was not *nominatim* substitute, should be at least served Heir in general to *Sempronius*.

Question *Tenth*, The Author still thinks *Titius* the Substitute must be Heir: But then he lessens the Matter, That there needs no Service, seeing if the Substitute crave the Money, it is in Place of an *Adition*, and no further is needful since *clare constat* by the Bond, that he is substitute to *Sempronius*. But then had it not been as good to have said, That the Substitution is sufficient without an *Adition* or entering to be Heir: For thus, the Hazard of Representation had been salved; and yet 'tis certain, that *Titius* will be liable to *Sempronius*'s Creditors *in quantum*; or, that *they* will be preferred to him.

But [illegible]
in the [illegible]
entered [illegible]
But what if the [illegible]
be charged? [illegible]
out any great [illegible]
Cases [illegible] Warrant to infeft both *Sempronius* and *Titius* the Substitute: But this would appear to be too great a Novelty, and therefore the accustomed Forms must be observed.

Question *Twelfth*, The Author states the Case of *Titius* the Substitute his dying before *Sempronius*, and how *Titius*'s Heir should attain to the Right, if he must be first Heir to *Titius* actually served, and then serve Heir to *Sempronius*? And he inclines to think that *Titius*'s Heir should be here understood *designative tantum*; so that if *Titius*'s Heir be such as may be served Heir to him, tho' he be not actually served, he may be served Heir immediately to *Sempronius*. And it appears indeed but reasonable according to *Sempronius*'s Destination, which is ever principally to be attended: And yet if *Titius* had survived *Sempronius* and the Right of the Bond had devolved to him as substitute, I should think that the Bond being only personal and moveable, as said is, it would fall to *Titius* his Executors, and not to his Heirs, as hath been above discoursed, for *Sempronius*'s Succession is *one* thing, and *Titius*'s Succession *quite* another.

Question *Thirteenth*, The Author debates if *eo ipso* that the Heir of *Titius* enters Heir to *Sempronius*, he also must be construed to have entered Heir to *Titius*: And he *resolves*, That since the apparent Heir of *Titius*, upon *his* Death, may serve immediately to *Sempronius*; this apparent Heir his entering Heir of Provision to *Sempronius*, cannot be construed an entering Heir to *Titius*: But tho' all this Reasoning appears probable, yet 'tis still obvious that the Substitute to *Sempronius* is *Titius* and his Heirs, and that *Titius*'s Heir should not be admitted upon his own Assertion, but first cognosced as such, before he can be allowed to enter Heir to *Sempronius*: But as I have said, the supposed Destination of *Sempronius* over-rules this Matter.

Question *Fourteenth*, The Author is very careful to set forth when *Heirs* are to be understood *actu* such, or only *designative*, that is, such as *may be* Heirs. And the first Case is that which we have had in Hand, when a Man appoints another Man's Heir to succeed to himself as Heir, for then the other Person's Heir is only called *designative*. The *Second* Case is, (which never Man doubted) when certain Persons and their Heirs are named Trustees in a Contract of Marriage for Execution. For certainly, the Heirs of these Persons, are not intended to be such *actu*, but only to be understood *habitu & designative*. The *Third* Case is, that of Tacks set for the Tacksmen's Lifetime, and that of Two or Three Heirs thereafter. The Heirs here are not intended to be *actu* Heirs for the Duration of the Tack, but only the Lives of such as are *habitu*, and may be Heirs; is regarded. For this Tack may be assigned, and it will endure to the Tacksman according to this Reckoning without the actual entering of Heirs. And the *Fourth* Case insinuate is, When Provisions are intended for Heirs, but so as they may not be obliged to represent the Person to whom they are Heirs. And on all

Debts & Deeds. *Secondly*, If *Titius* succeed by vertue of this Nomination without a Service, tho' the Author calls it an *aditio*, yet 'tis plain that *Titius* should only be liable to *Sempronius*'s Creditors *in quantum ad vires*, and so may be judged of *Titius*'s Heirs *de quatenus* succeeding as Heirs of Provision. But the Author remits this Question to be further considered when the Condition of Heirs of Provision and of Taillie, and how far they should be liable to their Predeceſſors Debts falls in. In the mean Time, it is plain with us, that the Heir general, and Heir of Line should indeed be firſt diſcuſſed: But this being done, we hold the Heirs of Proviſion or of Taillie to be likewiſe univerſally liable *in ſuo ordine* where the Taillie doth not make void the Debts, and this is Hardſhip enough. And it appears much more reaſonable that an Heir of Proviſion or Taillie, who ſucceeds not *in univerſum jus* ſhould be always allowed, when he comes to be attacked by Creditors, to renounce denude and abandon.

I have gone through theſe Queſtions, ſet down in *Latin* by the Author; without uſing the ſame Language, as judging the Remarks in *Engliſh* would better ſute with the reſt of this Work.

Feus.

N. IF a Feuer may refute as in the Caſe of other Holdings? The Difference being, That *Feuda* are *Beneficia*, *& invito, beneficium nec datur nec retinetur*: Whereas Feus are *Emphyteuſes*, and upon the Matter, perpetual Locations: And as *in locationibus* either *ad tempus*, how long ſoever, the Conductor cannot renounce; ſo there appears to be *eadem ratio* in Feus.

S. WHERE all bygones are cleared, a Feuar may, no Doubt, renounce: Whether the Feu be Ward, Blanch, or Few. And the ſame may be ſaid of theſe *Emphiteuſes* or perpetual Locations, if judged *Beneficia*: Albeit in an ordinary Tack or Location the Tackſman cannot renounce, without being liable to the Locator's whole *Intereſſe*.

N. WHETHER there be Non-entry in Feus, and the Liferent-Eſcheat of the Feuer doth belong to the Superior, ſeeing they are not *propriè Feuda*? And yet it is thought *ſapiunt naturam feudi*.

IF there be Non-entry, Whether before Declarator the Superior will have Right to the retoured Duty, which is the Feu-duty, beſides the Feu-duty to himſelf: And after Declarator, the full Profits?

S. A Nonentry in a Few-holding, is but the Few-duty before Declarator; but after Declarator, the full Profits. And if the Fewar be Year and Day at the Horn, we never doubt but that his Liferent-Eſcheat will vake to the Superior.

THERE is a Queſtion, If the Declarator ſhould be computed from the Citation upon the Summons, or, only after Sentence. And of old it was only reckoned after *Sentence*; but of late, we reckon it after Citation; as if the Vaſſal were thereby rendered *contumax*: But yet if he

Feudalia.

N. *FEUDA ... dari possint: Oder ut aliquis ab Imperatore investiri posset ... nec tamen Dux aut Comes fit.* Thes. Beford. in litera I. 18. verbo, Innhabern. def. P. 428.

S. This holds also with us: For tho' a Creditor should adjudge a Dukedom or Earldom, that will not either make him Duke or Earl.

Fiar.

N. 1. When Lands are disponed to a Person, without Mention either of Heirs, or that he is Fiar or Liferenter; or that they are disponed heritably: *Quæritur*, If he be Fiar?

2. In Conjunct-Fee, where there are no Degrees of Substitution whether is the Husband or Wife Fiar?

3 When Lands are given in Conjunct-Fee to the Husband and Wife, and their Heirs; who is Fiar?

4 If the Husband be Fiar; whether at least the Heirs betwixt him and her, are to be understood his Heirs; or his Heirs whatsoever?

5. If Lands be disponed to Two Brothers by their Father, and their Heirs; if they be both Fiars *ex semisse?*

6. If when Lands are disponed by a Father to Two Brothers and the Heirs of their Body; if one die without Heirs of his Body, whether it be *substitutio reciproca?*

7. When Lands are disponed to Husband and Wife, and their Heirs of the Marriage; and these failzieing, the Half to the Husband's Heirs, and the other Half to the Wife's: *Quæritur*, Whether the Husband be so Fiar, that the Wife's Heirs, failzieing Heirs of the Marriage, will be Heirs of Provision as to the Half?

8. When it is intended that the Wife should be a Joint-Fiar: If the Right should not be to the Husband and her; and after their Decease, the Half to his Heirs, and the other Half to her Heirs?

9. When a Right is given to Two Persons, and to the longest Liver of them Two, and the Heirs of the longest Liver; who is Fiar? And if the Fee be *in pendenti?*

10. When the Fee is provided by Contract of Marriage to Bairns; and accordingly a Right is granted in the foresaid Terms, there being no Bairns for the Time: *Quæritur*, When a Child is born, whether the Fee be immediately in his Person?

11. If it be *in solidum* in his Person, and thereafter others be born? *Quæritur*, *Quid juris*, and if *concursu faciunt partes?*

12. In Conjunct-Fees where there is no Substitution, the Heirs determine the Fee.

13. Where there are Degrees of Substitution, the Person whose Heirs succeed first is Fiar; and all the Substitutes thereafter are Heirs of Provision to the Fiar by Progress.

to the Grandfather, and *bares parentes* should be *bares paternæ*.

§. If Lands were disponed to [illegible] and neither bearing the Quality to be in liferent, nor yet the Quality to be disponed fiarly; but simpliciter, [illegible] would be a singular Case, and seem to appear to be but a Perfect Usufruct; unless a just Price were made appear to be payed: And yet in plain Law it should be repute Heritable, and transmit to his Heirs.

In a Conjunct-fee to a Man and his Wife and their Heirs, and no further Substitution, the Fee would be in the Person of the Man, as *dignior*: And yet if the Lands came by the Wife, it may be well thought that she is the Fiar: For this is a Speciality: And the Case is but conjectural.

But if the Husband be Fiar in the said *First* Case, and there be no Heirs betwixt them, *'tis thought* the Fee will not go to *his* Heir: For the Words seem to be plain. But then it must either be Caduciary, or return; neither of which seem to be intended.

If Lands be disponed by a Father to Two Brothers and their Heirs; they appear to be both Fiars for their Halves; and these Halves will also descend to their respective Heirs: But being *re*, as well as *verbis conjuncti*; *concursu tantum partes faciunt*.

If Lands be disponed by a Father to Two Brothers and the *Heirs of their Bodies*: And One dies *without* Heirs of his Body; his Half should return or fall: 'Tis true, in the *Civil Law*, a Legacy being left to Two, without adjoining *equally betwixt them*, they were judged to be *conjuncti re & verbis*; and that there was *Jus accrescendi* betwixt them; and that *concursu tantum partes faciunt*. But 'tis doubted if this should hold with us, in Dispositions of Lands: For even in the Civil Law, it held only where One of them failed; but where both once succeeded, it altered the Case.

Lands being disponed to Husband and Wife, and their Heirs of the Marriage; which failzieing, the Half to the Husband's Heirs, and the other Half to the Wife's: In this Event, the Wife's Heirs must succeed, as Heirs of Provision in their Half, to the Husband; for he, being *dignior persona*, and no other Speciality, must be reckoned Fiar.

If Lands were disponed to a Man and his Wife equally betwixt them, and their Heirs: They might be thought to be Joint-Fiars, but *verbis tantum*, so that the Wife might dispone upon the Half. But if the Disposition were to the Husband and his Wife, and after their Decease, the Half to his Heirs, and the Half to her's: I should think the *Man* still Fiar, and that the Heirs betwixt them would succeed to *him*; and if none, the Wife's Heirs, for her Half, would be Heirs of Provision to the Man.

When a Right is given to Two Persons, and to the longest Liver of them Two, and to the Heirs of the longest Liver; *Who is Fiar?* And if the Two Persons be equal and fuced *actu*, I would judge them both Fiars *concursu*, but so as the One may not dispose without the Other; for in effect they are both Fiars, and also both Liferenters: But then the longest Liver will come to liferent the whole, and his Heirs will succeed after him, partly as Heirs to him, partly as Heirs of Provision to his Conjunct.

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It hath been ſaid, That in Conjunct-Fees, the Heirs, when they divide, determine the Fee; That is, if the Conjunct-Fee be to Man and Wife and their Heirs, the Man, as
Wife's Heirs. But if the Conjunct-Fee be to Two indifferent Perſons and their Heirs, both of them are Fiars and Liferenters: And after the Death of the longeſt Liver the Lands will fall to their Heirs, that is, to their reſpective Heirs. For even upon the Death of the firſt of them, his Half would tranſmit, tho' with the Burthen of the others Liferent.

Where there are Degrees of Subſtitution, the Perſon whoſe Heirs are firſt in the Inſtitution or Subſtitution is Fiar, and all the after Heirs ſubſtitute are Heirs of Proviſion to that Fiar.

A Bond is taken to a Perſon and his Heirs, excluding Executors: If his Grandchild by a Daughter, being once Heir, ſhould deceaſe without Iſſue, his Father will ſucceed to him: For the Grandchild, being once Fiar; the Succeſſion muſt be *ex parte patris*.

Fiars of Bonds.

N. A Bond being in theſe Terms, To a Man and his Wife and the Heirs of the Marriage; which failzieing to the longeſt Liver of them Two and the Heirs of the Surviver: *Quæritur*, who is the Fiar?

A Bond being granted to a Husband and his Wife, and the longeſt Liver of them Two in conjunct Fee; and to one of their Sons nuprely named and the Heirs of his Body: Whilks failzieing to the Heirs to be procreate betwixt the Husband and the Wife; whilk failzieing to the Wife's Heirs and Aſſignies: *Quæritur*, Whether the Fee of the ſaid Sum pertaineth to the Husband, or to the foreſaid Son, or to the Wife? *Ratio Dubitandi*, That the Right of Succeſſion terminates upon the Wife and her Heirs, which ſeems to import that ſhe is Fiar. *Item*, As to the Son the ſaid Sum being provided to his Heirs in the firſt Place, it ſeemeth that the Fee ſhould pertain to him: Seeing the Heirs of his Body are to ſucceed in the firſt Place, and the Fee of Money (as it is ſaid of the *uſufructus* of Money, that it is *quaſi uſufructus*) is *quaſi feodum & Proprietas*: And properly that is ſaid to be *Property* which belongeth to a Perſon and deſcendeth to his Heirs: And yet it is thought that the Fee of the ſaid Sum doth belong to the Husband, in reſpect the Money being his own was lent by him in Behalf of himſelf and the foreſaid Perſons: And albeit when a Bond is conceived ſimply to a Husband and his Wife in conjunct Fee, and to her Heirs and Aſſignies, ſhe is Fiar; for the Reaſon foreſaid, that it is to belong to her and her Heirs only. Nevertheleſs when there is diverſe Degrees of Subſtitution of Heirs of diverſe Perſons and of a Wife in the laſt Place, the Perſon

[illegible] to be [illegible] to be pay[illegible] had [illegible] Mother and not to their Father; and that the Mother [illegible] have Power to Dispose of the Sums in Prejudice of her Husband's Children. And albeit the said Son's Heirs be first named, yet it is clear that he is not Fiar, seeing he is to be Heir of Provision to his Father. As if an Infeftment were granted to his Father and Wife in conjunct Fee, and failzieing of them by Decease, to a certain Person their Son and the Heirs of his Body: The Son in that Case would be Heir of Provision.

A Bond being granted to a Man and his Wife and longest Liver of them Two and their Heirs: And the Wife having survived: *Quæritur*, If she will be Fiar of the said Bond?

A Person having infeft his Creditors for Security of Debts, and while they be payed respectively: *Quæritur*, *quatenus* they are Fiars whether *in solidum*, or *ex parte*: And *qua parte? Respondetur*, They are Fiars proportionally, and *ex parte* effeiring to their Debt.

S. A Bond being taken in these Terms to a Man and his Wife, and the Heirs of the Marriage; which failzieing to the longest Liver and the Heirs of the Surviver: I still think the Man Fiar and the Wife only Liferenter; and that incase there be no Heirs of the Marriage, and she survive, her Heirs will be Heirs of Provision to the Man.

A Bond being granted to a Husband and his Wife, and the longest Liver in conjunct Fee, and to one of their Sons expressly named, and the Heirs of his Body; which failzieing, to the Heirs to be procreate betwixt the Husband and Wife; which failzieing, to the Wife's Heirs and Assignies, *Whether doth the Fee of this Sum pertain to the Husband, or to the foresaid Son, or to the Wife.* And it is thought, that the Money being the Husband's, the Fee is still in his Person, and the Son must succeed to him as Substitute. But since the Wife here hath an equal Interest with the Husband in all that proceeds, and that the first Distinction betwixt them is to the Wife's Heirs. It may be thought it gives her the Fee, for if a Right were to a Man and his Wife in conjunct Fee, and to the Heirs to be procreate, not betwixt them, but betwixt two absolute Strangers, which failzieing, to the Wife's Heirs, the Wife may justly be thought Fiar. But this last is not casible, and the Man's Dignity in the first Case is still more eminent.

A Bond being granted to a Man and his Wife, and longest Liver of them Two, and their Heirs, the Wife surviving, is only Liferenter, and the Fee is in the Man's Person.

When Creditors are infeft for Security of their Debts they appear to be Fiars proportionally.

Fiars in Tailzies.

N. BY a Contract of Marriage, Lands being given in Tocher, and the Right thereof so conceived, that they were disponed to the Husband and the Gentlewoman in Conjunct-Fee and Liferent, and to the Heirs of the Marriage; whilk failzieing, to the Heirs of the Husband his Body in any other Marriage; whilk failzieing, to the Woman's Heirs and Assignies whatsomever: *Quæritur*, Who is Fiar? An-

SWER,

SWERE That [illegible] ...ceing the Heirs of the [illegible] ...; because there are divers Degrees of Succession (as in this Case) the Husband (*cujus hæredibus maxime prospicitur*) it is thought should be Fiar; seeing not only the Heirs of the Marriage gotten by him, but in the next Degree, his Heirs of any other Marriage are substitute; and *in ultimis tabulis*, the Wife's Heirs, and as Heirs of Provision to the Husband: And the Husband having given a Jointure, it is thought to be in Lieu of the Tocher, and to belong to him as Fiar, and not as simple Liferenter.

A Bond for a Sum of Money being granted to a Man and his Wife, and longest Liver of them Two, and to their Heirs and Assignies, excluding Executors: And the Wife having survived the Husband, and a Bairn being likewise on Life of their Marriage: *Quæritur*, Whether the Relict will be Fiar?

If a Bond be granted to Two Brothers in the Terms foresaid, and one of them deceasing having left Children, and the other surviving having also Children: *Quæritur*, Who is Fiar?

S. When Lands coming by the Wife are disponed to the Husband and her in Conjunct-Fee and Liferent, and to the Heirs of the Marriage; which failzieing, to the Husband's Heirs of any other Marriage; which failzieing, to the Woman's Heirs and Assignies: *It is thought*, the Husband is Fiar, *nam ejus hæredibus maxime prospicitur*; yet the Lands, coming by the Wife, and her Heirs last, may almost preponderate.

When a Bond is granted to a Man and his Wife, and longest Liver of them Two, and to their Heirs and Assignies, excluding their Executors: Tho' the Wife *survive*, she is only Liferenter, as hath been said.

A Bond is granted to Two Brothers, and the longest Liver, and their Heirs, and both of them have Children. It is thought, the Fee divides, and that the longest Liver hath only the Liferent of the whole.

Fictio Juris.

N. Quæritur. A Debitor being deceas'd, what Way can the Comprifer be infeft? Answer, The Decreet of Reduction putteth the Debitor *quoad* the Creditor in the same Case as if he had not been denuded *Fictione Juris.*

S. The Case is not clearly stated.

Fiscus.

S. This and the Three following Titles, *Commissa Fisco*, *Flumina*, *Flumina Publica*, are only Citations: But *Flumina Censitorum vice funguntur in agris tantum non arcifinÿs.*

Forfaulture.

N. A Sub-vassal being forfaulted, Whether His Majesty's Donatar will have Right to the Estate free of Servitudes, and Rights not consented to by the immediate Superior?

[illegible]

ANSWER, [illegible] His Majeſty, and thoſe who hold [illegible] the firſt they cannot be prejudged ſo as to be put to hold of any other than His Majeſty, and to be more remote from the Fountain: The others are not prejudged, ſeeing they are put in the Condition they were in formerly; And as the former Superior might have diſponed the Superiority, and reſigned; ſo His Majeſty cannot be denied the ſame Power: And His Majeſty's Diſpoſition is *actiones juris* equivalent to a Reſignation, ſeeing there is no other Superior in whoſe Hands the King can reſign.

IF a Sub-vaſſal, to a Vaſſal holding of the King, be forefaulted for Treaſon; will ſubaltern Rights granted by him fall under Forefaulture? Seeing it is pretended that ſuch Forefaultures belong to the King, not as Superior, but *Jure Coronæ* and as Prince; *& noxa caput ſequitur*: And the King has no Prejudice having a Vaſſal. Yet I think that theſe Rights ſhould fall, *Quia reſoluto Jure Dantis reſolvitur Jus accipientis*: And if the Sub-Vaſſal ſhould forefault his Lands by Recognition, his Vaſſals Right would forefault: And it is againſt Reaſon, That Treaſon being *Crimen gravius*, the Forefaulture and *pœna* ſhould be *levior*: And Treaſon is *Crimen feudale* and againſt the King as Superior Paramount: And as the betraying of a mediate Superior will import Forefaulture, not only of the Sub-Vaſſal but of his Vaſſals; there is the ſame or greater Reaſon, that Treaſon againſt the King ſhould have the ſame Effect: And the Reaſon that the Forefaulture of the Sub-Vaſſal ſhould belong to the King is, becauſe the Crime is committed againſt him as higheſt Superior.

IF the King's immediate Vaſſal ſhould confirm the Inferior Rights, if there be any Alteration of the Caſe? Seeing the King is in place of the Vaſſal, becauſe the Crime is committed againſt the King as Superior, and he ſhould be in no better Caſe: And the Vaſſal if he were to have the Benefit of the Forefaulture, could not Queſtion the ſaid Rights.

IF a Perſon infeft in Liferent be forefaulted for Treaſon, will the Liferent expire though he ſurvive? Seeing he is *nullus*, and after Treaſon doth neither tranſmit *cedendo* nor *delinquendo*.

§. THE Act of Parliament 1690, intitled, *Act for Security of the Creditors, Vaſſals, and Heirs of Tailzie of Perſons forfeited*, hath made a great Alteration in this Subject: But it is here reviewed more for Argument's Sake than any thing elſe.

A Sub-Vaſſal being forfeited; Will his Majeſty's Donatar have Right to the Eſtate, free of Deeds, not conſented to by the immediate Superior? Or, If a Sub-Vaſſal to a Vaſſal holding of the King be forfeited for Treaſon, Will ſubaltern Rights granted by him fall under Forfeiture? And it may be thought, Since the Forfeiture here falls *jure Coronæ* rather than *jure feudali*, the King ſhould only have Right to the Superiority that was in the Sub-Vaſſal's Perſon. And it ſeems not to be here, *Reſoluto jure dantis, reſolvitur jus accipientis*; which might indeed hold, if the Sub-Vaſſal ſhould forfeit his Lands by Recognition, to make the ſubaltern Rights flowing from him alſo to forfeit: But here, the Sub-Vaſſal's Right is only taken from him *per modum pœnæ*: Yet what the Author ſays, *That the Treaſon is againſt the King, who is*

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Sentence he becomes *nullus civiliter*, yet the Liferent will forfault while he lives.

N. A Person being infeft in Trust, and to the Use and Behoof of another: *Quæritur*, If he commit Treason, Will he forfault the Right of the Lands to his Majesty? Seeing albeit his Right be to the Use and Behoof of another, yet he is Vassal; and as the *French* say, he is *homme vivant & confisquant*: And there is no Reason the Superior should be defrauded: And the Granter of the Right is to be blamed that he trusted such a Person.

S. If a Person infeft in Trust to the Use and Behoof of another, should be forfaulted; unless his Infestment did expresly bear that it was to the Behoof of another, the Right would forfault, notwithstanding of any other Deed ascertaining the Trust. But if the Infestment did expresly bear *to the Behoof*, nothing but the Rigour of Forfeitures could carry this Right.

N. By the *English* Law, though a Person dispone for onerous Causes, he is not liable to warrant unless he be expresly bound; otherwise the Acquirer is presumed to take his Hazard: But with us no Warrandice, is absolute Warrandice.

S. With us, in Dispositions for onerous Causes, no Warrandice, is absolute Warrandice: But if granted for Love and Favour, no Warrandice, *is* no Warrandice.

N. Quæritur, If a Donatar to a Forefaulture has Action for Exhibition and Delivery of Evidents?

S. If a Donatar to a Forfeiture have perfected his Gift, he may no doubt pursue for Exhibition and Delivery of the Writs of the Lands forfeited.

N. The Vassal of a Subject, having granted a subaltern Right to be holden base, and the same not being confirmed by the mediate Superior: *Quæritur*, Whether the Sub-Vassal's Right foresaid, will fall under the Forefaulture of his immediate Superior being forefaulted? Answer, It is thought that it will fall under the Forefaulture, in respect that if the Person forefaulted had committed a Crime against his immediate Superior, whereupon the Lands would have recognosced or forefaulted to him, the Sub-Vassal his Property would have fallen under the Forefaulture; and there is *eadem* if not *major Ratio* in the Case of Treason, the King being Superior Paramount, and the Crime against him being also a Crime against the mediate Superior; there being no greater Wrong than to be a Traitor to the Superior.

Quæritur, quid juris, If the mediate Superior had confirmed the Sub-Vassal's Right?

S. A Forefaulture by Sentence of *Parliament* [illegible] but if by Sentence of *Justiciary*, it [illegible]

N. Lands being comprised, and a Signature being past upon the Comprising, but no Infeftment being taken thereupon: *Quæritur*, If the Debitor commit Treason in the *Interim*. Whether the same will fall under Forfaulture? Answer, It is thought that it will not; seeing the Debitor was fully denuded; there being no Vestige of Right in his Person; seeing he is divested by the Comprising as if he had resigned, and the Superior had accepted the Resignation.

Quæritur, Quid juris. If there were only a Comprising without a Signature? And the Question may be more general; *viz.* If in all Cases the Heritor be so denuded, that he cannot prejudge the Comprifer by any Deed whereupon Recognition or other Forfaulture may follow, in Favours of the Superior; otherwise, a malicious Debitor may, of Purpose, do such a Deed to prejudge his Creditor.

To consider if there be a Difference betwixt a Disposition and Resignation accepted by the Superior, and a Comprising whereupon nothing has followed?

Item, If the presenting of a Signature on a Comprising to the Exchequer, be equivalent to a Resignation in the Superior's Hands, and accepting?

Item, Whether a Charge to other Superiors to enter the Comprifer, be equivalent to a Resignation?

S. The Author judges the Case of Lands comprised and a Signature thereon past, but no Infeftment taken, to be the same with the Case of Lands resigned and the Resignation accepted, but no Infeftment. And that in both Cases, the Debitor or the Resigner committing Treason in the *Interim*, forfaults nothing, because totally denuded. But this is a Mistake: For in these Cases, neither of the Two is denuded, until Infeftment actually follow.

Quid juris, *In case there be only a Comprising, but not completed, Can the Debitor by any Deed thereafter, make the Lands recognosce, or forfault, in Prejudice of the Comprifer.* If the Comprifer be not *in mora*, it were hard that the Debitor could prejudge him: Yet in the Case of his committing Treason, the Forfaulture would have prevailed. We must here, as in the Case of Recognition, suppose the Comprising to be of the lesser Part of the Feu.

The presenting of a Signature on a Comprising in Exchequer, appears to be equivalent to a Resignation made and accepted.

A Charge by the Comprifer to the Superior is, since the Act of Parliament 1681, held equal to an Infestment to make the Comprising effectual.

N. If after a Person is forfaulted, an Estate should fall to him, as appearand Heir to any Person, he being yet on Life; Whether would the same pertain to the King, or to the next *Heir*, as if he were deceased? Seeing he is *nullus*, being forfaulted, and is not in a Capacity to be appearand Heir.

not will the
citizen Estate
Grandchildren
is corrupted,
said is?

S. A Person is forfaulted, but still on Life, if an Estate should in that *Interim* fall to him as apparent Heir, tho' he be *civiliter mortuus*, and not in a Capacity to be served; yet with us, the First would have claimed the Estate.

THERE is no Difference with us, betwixt the *ante-nati* and the *post-nati* in the Case of Treason committed by the Father: For the Disabilitation of Children is not *ex traduce*. But it is the Rigour of the Law that taints all the Blood.

N. A Person having married an Heritrix, and being thereafter Forfaulted: *Quæritur*, If the Blood of the Children be so tainted and corrupted, that they cannot succeed to their Mother? *2do.* If the Mother should not dispone in her own Lifetime, Whether her Estate will fall to the King by the Incapacity of the Children, being her appearand Heirs?

AN Heretrix being Wife to a forefaulted Person, if as long as he liveth, the King will have right to the Mails and Duties *Jure Mariti*? *2do.* If she may dispose of her Estate without his Consent, seeing he is *nullus* in Law: And yet is her Husband, the Marriage not being dissolved with the Forefaulture?

S. IF a Man having Children by an Heiress, come to be forfeited, the Children must be rehabilitate before they can succeed to their Mother, but it were great Rigour to refuse to rehabilitate them. Thus the Husband of an Heiress being forfeited his *Jus mariti*, and also Courtesy falls to the King. But whether she might dispone the Fee without her Husband's Consent incase of his surviving the Forfeiture, may be doubted, but there appears no Law in the contrary.

N. A Father having disponed his Estate to his Son, with Reversion and Power either to redeem or dispone: *Quæritur*, If the personal Faculty may, notwithstanding, be comprised during the Father's Life; and may be used even after the Death of the Father? There is the same Question as to Forefaulture.

S. WHERE a Father dispones to his Son, with a Power reserved to alter, the Lands may be comprised from the Father by a Creditor, and so he would also forfeit them in the Case of Treason.

N. A Woman being Heretrix of Lands in *Scotland*; and the same being tailzied to the Heirs of her Body; whilk failzieing, to certain other Heirs; with the ordinary Clauses irritant, that she and they should not have Power to prejudge the Tailzie: *Quæritur*, If her Husband being forefaulted, the Blood be so corrupted that her Children cannot succeed, and if their Interest of Succession will fall to the King?

S. IT is already answered, that the Children of an Heiress in the Case of their Father's Forfeiture must, and also should, be rehabilitate, that they may succeed.

the Debitor being forefaulted?

S. A Tack set for an onefous Cauſe, and the Tackſman in Poſſeſſion before the Setter incurr Forfeiture, would not have been good before the Act of Parliament 1690, but now it will be good. And ſo it differs from a Feu, tho' *Jus fortius*, becauſe it needs no Conſent of the Superior to eſtabliſh it. And by the ſame Act 1690, a Debitor's being forfeited will not prejudge the Creditors. See the Act.

N. THERE being a Minute of Contract anent the ſelling of Lands, and the Buyer being thereafter forefaulted; *Quæritur*, If the King or his Donatars will have Right to the ſaid Minute in the ſame Condition as the Buyer? or if the Seller can raiſe a Declarator to be free of the Minute? Seeing albeit where there is clear Right and Intereſt belonging to a Perſon forefaulted, the ſame will pertain to the King; yet when a Bargain is only *in fieri*, and there are diverſe Obligements upon the Part of the forefaulted Perſon, the Seller ought not to be in worſe Caſe, and in place of a Subject have ſo powerful an Adverſary. The Earl of *Tarras*, and the Heirs of *Walter Riddel*.

S. IF after a Minute of Contract for the Sale of Lands, the Purchaſer come to be forfeited; the King or his Donatar will juſt have Right to the Purchaſer's Part of the Minute: But in the Proſecution muſt perform what the Perſon forfeited was obliged to do.

N. THE Laird of *Ceſnock* having acquired from *Caſtlemains* the Barony of *Caſtlemains*, but not being infeft but baſe before the Forfaulture: *Quæritur*, If by his Forfaulture, theſe who had Rights holden of *Caſtlemains*, not confirmed by the King, will be in any Hazard? ANSWER, It is thought, not: Seeing any Right *Ceſnock* had to the ſaids Lands, was not as the King's Vaſſal. In which Caſe the ſubaltern Rights would have fallen; and *Caſtlemains*'s remaining the King's Vaſſal, *Ceſnock* had only the Right of Property holden of *Caſtlemains*. And as to *Caſtlemains*'s Right holden of the King, *Ceſnock* had only *jus ad rem* by the Contract or Diſpoſition; ſo that thereby the King by the Forefaulture may come to *Caſtlemains*'s Right, and force him to denude of the ſame; but it cannot be ſaid that the ſaid Eſtate came in the King's Hand by the Forefaulture of a Vaſſal.

S. THIS Caſe we had before. And 'tis true, that any Right *Ceſnock* had to the ſaids Lands was not as the King's Vaſſal, in which Caſe the ſubaltern Right would have fallen, but *Caſtlemains* remained the King's Vaſſal, and *Ceſnock* could have only the Right of Property holden of *Caſtlemains*; but as to *Caſtlemains*'s Superiority, *Caſtlemains* could not interpoſe *Ceſnock* betwixt him and his Vaſſals, but *Ceſnock* having alſo Right by *Caſtlemains*'s Diſpoſition and Procuratory therein to *Caſtlemains*'s Superiority, *Ceſnock*'s Donatar may thereby attain to the ſame, but *Caſtlemains*'s Vaſſals will be ſafe. *See above in Confirmation.*

Semprevile

N. Semprill having right to certain Lands, which are parcel of a Barony feued by the Arch-Bishops of *St. Andrews*, who did confirm the same Feu of the Arch-Bishops of *St. Andrews*; who did confirm the subaltern Rights granted by the said Earls: *Quarritur*, Whether the said Lands belonging to the said *Semprills* do fall under the Forefaulture of the Earl of *Argile*, notwithstanding the Confirmation granted by the Bishops: In respect the said Rights are not confirmed by the King?

In Answer to the said Query, *It is thought*, that the said Lands do not fall under the Earl's Forefaulture, for these Reasons:

1mo. The Earl of *Argile* did forefault only what did belong to himself, *Nam noxa caput sequitur*; and the said Lands did not belong to him in Property, but only in Superiority: And there is a Difference betwixt the said Case, and the Case of Lands holden immediately of the King himself; which by the Forefaulture of his Vassal are forefaulted, and does return to the King as he did give them pure and free, and without the Burden of any other Right granted by the Person forefault, but such as the King did consent to and confirmed: Whereas in the Case in Question, the said Earl did not hold the forefaids Lands immediately of the King, but of the Arch-Bishop, who stands still His Majesty's Vassal: And as his own Right is not prejudged by the said Forefaulture, so the Right of the Sub-Vassal consented to and confirmed by him, is not prejudged by the said Forefaulture.

2do. Lands holden of the Bishop Ward, or which would fall in his Hands upon Recognition or otherwise by the deed of the Earl of *Argile*, being disponed by the Earl to be holden of himself; will not recognosce by the Earl's Deed in disponing the Superiority or otherwise, if the Bishop had confirmed the Sub-Vassal's Right; and there is the same Reason in the Case of Forefaulture, in respect by the common Law when Lands do fall and are confiscate, they fall to the immediate Superior: And by our Custom in the Case of Treason the King has that Privilege, that the Lands which are forefault are confiscate and forefaulted to him; because the Crime is committed against him. And therefore the Lands holden of other Superiors do forefault to the King, no otherwise than they would belong to other Superiors, if the Forefaulture did belong to them; In which Case the Confirmation of the subaltern Rights by the immediate Superior of the Person forefaulted, would save the subaltern Rights that they could not fall under Forefaulture.

3tio. By the Law and Custom of the Kingdom it is lawful *Subinfeodare*; and albeit it may be pretended, that if the Bishop had not confirmed the Feus granted by the Earl of *Argile*, they would have fallen by his Forefaulture though lawful *ab initio*, seeing *res devenit ad aliam causam & resoluto Jure dantis resolvitur jus accipientis*: Yet in the Case of Confirmation by the Bishop, there is a great Difference; seeing the subaltern Right doth only depend upon *Argile*'s Right so that it falleth with it; but has another Foundation whereupon it does subsist; *viz.* the Bishop's own Right and the Confirmation granted by the Bishop; and specially in this Case, seeing it appears by the Confirmation that the same is granted not to gratify the Sub-Vassal, and to prevent Prejudice to him by the Forefaulture of *Argile* if it should fall out, but in order to the Bishop's own Interest and Advantage; in respect by the Confirmation there is reserved to the Bishop, beside the Feu-duty payable to *Argile*, a Feu-duty to himself and his Successors; with a Clause irritant if it be not payed: And *fictione brevis manus*, the Feuer is in

the ſame Caſe as if [illegible] the ſaid Lands to the Earl of *Argile* in Property for Payment to the Earl of *Argile* of the [illegible] Charter, and to the Biſhop the ſaid other Duty: In which Caſe Forefaulture could not prejudge the Feuer of the Rights of Property granted by the Biſhop himſelf, nor the Biſhop of the ſaid Additional Duty.

4*to*. By the Acts of Parliament K. *Ja.* II. and K. *Ja.* IV. *anent the ſetting of Feus*, and by Cuſtom ever ſince, the ſetting of Feus was ſo ſpeedful and neceſſary in order to the Policy of the Kingdom; that Vaſſals are not only allowed, but invited to ſet their Lands in Feu; which in effect is a general Confirmation of all Feus; ſo that the Feuars ſhould not be in Hazard either by the Ward or Non-entry or by any Deed or Delict of the Superior; but ſhould be liable only to pay their Feu-duties to theſe who ſhould have Right upon Occaſion of the ſame: And the ſaid Barony being of a large and vaſt Bounds, albeit it was feued to the Earl of *Argile*; yet for the labouring and bringing it in, it was neceſſary to ſet it in Parcels to other Feuars holden of him: And the Feus in Queſtion are granted before the Year 1606.

5. The Author here *ſtates the Caſe* of a Right to certain Parcels of a Barony feued by the Earls of *Argile*, who held the ſame Feu of the Arch-Biſhop of St. *Andrew*'s, who confirmed the ſubaltern Rights granted by the Earl; *And reſolves*, That the ſaids Lands do not fall under the Earl's Forfaulture, and gives his Reaſons at large. But if, notwithſtanding the Arch-Biſhop's Confirmation of the ſubaltern Rights granted by the ſaids Earls, the Earls remain Superiors, the Confirmations being only *De me*, the Rigour of the Forfaultures, according to the then Law, would prevail againſt all the Author's Reaſoning; And nothing could ſave theſe ſubaltern Rights, except the Acts of Parliament *James* II. and IV. anent the Setting of Feus. But if the ſubaltern Rights were granted by the Earl, to be held of the Arch-Biſhops, and by them confirmed; theſe ſub-Vaſſals did no more hold of the Earls, and could be in no Hazard by the Earl's Forfaulture.

N. A Sub-Vaſſal holding of a Perſon forfaulted, and his Right not being confirmed either by the forfaulted Perſon's immediate Superior, or by the King: *Quæritur*, If his Right will fall under the Forfaulture? *Ratio Dubitandi, Licebat infeodare, & noxa caput ſequitur*: And yet it is thought it will fall under the Forfaulture; becauſe, *reſoluto jure dantis*, &c. And, tho' it be lawful to grant ſubaltern Rights, yet it is always *cum ſua cauſa*.

A Superior being forfaulted, and his Vaſſal's Right not being confirmed, and ſo falling: *Quæritur*, If his Majeſty ſhould confirm the Vaſſal's Right, If that will be *habilis modus* to ſecure againſt a poſterior Donatar? *Ratio Dubitandi*, The Vaſſal's Right being altogether extinct by the Forfaulture, there is nothing to be the Subject of a Confirmation, which cannot be of *non entis*; and the Vaſſal ſhould have obtained a Gift upon the Forfaulture. And *contrà*, The Vaſſal's Right not being null of it ſelf, but ſuch as could not prejudge the King when Lands return to him by the Forfaulture of the Superior, becauſe he did not conſent to the ſame; his Conſent thereto at any Time may convalidate the Right before *Jus* be *quæſitum* to a Donatar.

S. A Sub-Vassal holding of a Vassal forfaulted, his holding of *him* must forfault with him, unless the Sub-Infeftment be confirmed by the saids Acts of Parliament.

A Superior being forfaulted, and his Vassal's Right not confirmed, and so falling under the Forfaulture; the King's confirming of the Vassal's Right cannot but secure him against a posterior Donatar. For, to say, that the Vassal's Right became extinct by the Forfaulture *eo ipso*, and so was not confirmable, is but a *Notion*: For the Vassal's Right was not null in itself; but only such as could not prejudge the King in the Return upon the Forfaulture, which the King may dispense with.

N. If, after Forfaulture, His Majesty having granted a Remission, the Person forfaulted is redintegrated to his Estate, as if the Forfaulture had not been: Or if he should take a new Right upon the Forfaulture?

S. The King granting a Remission *after* Forfaulture, restores the Person forfaulted entirely, if the Forfaulture was not gifted off before. But a Remission will not prejudge a prior Donatar, but only exempt the Person from the Pains, and restore him in so far as not gifted.

N. When a forfaulted Person has Right to succeed to any other Person as Heir, so that not only his own Estate, but what would belong to him if he had entered Heir, would fall to the King by his Forfaulture: *Quæritur*, Will the King be liable to the Debts of the Defunct, seeing he does not succeed to the Traitor's own Estate and Patrimony, but *in hæreditatem, quæ est nomen universitatis*, both as to the *Debita* and *Bona*: And there is no Reason that the Defunct's Creditors should be prejudged, unless they had been *in culpa* either themselves or their Debitor.

S. A Person forfaulted doth not only forfault his own Estate, but also any Estate that would fall to him as apparent Heir: And the King or his Donatar will be liable to no Debts of the Defunct: For it is vain here to pretend that a Forfaulture carries the *Universitas bonorum*, and so should include *Debita* as well as *Bona*: For in evety Case it carries the *Universitas*: And the Innocence of the Creditors signifies nothing in any Case. But such was the Rigour of Forfaultures, notwithstanding of the Author's Moderation: And it is known, That in these strict Times, when a Man's eldest Son, his Father being on Life, came to be forfaulted, the Exchequer refused a Resignation from the Father in Favours of any other Person, tho' the Father was most innocent; but on Purpose that they might make the Succession devolve upon the Son forfaulted.

N. His Majesty having presented, upon Forefaulture, a Vassal; If that Superior should be thereafter forefaulted: *Queritur*, If the Feu not being confirmed, will fall under Forefaulture? *Ratio Dubitandi*: The Feuar is in the same Condition with our Sub-Vassals; so that if he do not apply for Confirmation he is liable to the same Hazard. And yet on the other Part it may be thought, that the Reason why Confirmation is necessary is, because when Lands return to the King they return as they were given free of all Rights and Burdens, but such as the King did consent to, which doth cease in this Case; seeing the King is not only Consenter to the Sub-Vassal's Right, but is Author by the Presentation.

made should be hereafter forfeited, the Heir not being [illegible] the King would in the Event fall under the Superior's [illegible] but agreeable to all Reason that a Person should forfeit a Right [illegible] the Crime of his Superior, when he is prefered to that Right [illegible] King himself, which seems to be more than an ordinary Confirmation.

N. A Person having committed Treason, and thereafter his Kinsman to whom he might have succeeded, being deceased: *Quæritur*, If that Defunct's Estate will fall to the King, or go to the next Heir? *Ratio Dubitandi* That there seems to be a Difference betwixt the Case in the Fifth Question of the Title *Heir*, when a Person being apparent Heir, and having *hæreditas delata* before he commit Treason, the same should fall to the King; seeing he was *hæres habitu*, and had *jus quæsitum* in his Person before his Treason, and therefore forefaults the same to the King. Whereas in this said other Case, when the Succession fell, the Traitor could not have any Right in his Person being *nullus* and incapable of Succession: So that it cannot be said that he is *Legitimus* and *propinquior hæres*.

S. Tho' this Case seems to differ from that of an apparent Heir having *hæreditas delata* before he commit Treason, for here the apparent Heir commits the Treason before the *hæreditas delata*, and so when he was *nullus* and incapable of Succession: Yet according to the *late* Rigour all would have gone with the Forfeiture.

N. A Person holding Lands Ward of the King did give Infeftment to be holden of himself Blench, and the same being confirmed by the King, the Granter was thereafter forefaulted, so that the Sub-Vassal did come to hold of the King: *Quæritur*, Whether he will hold as he did formerly, or Ward as his immediate Superior did?

S. If by the Confirmation being *a me*, he did hold of the King, the Forfeiture will not prejudge his Holding; but if the Confirmation was only *de me*, tho' it save from the Forfeiture, yet it will not prejudge the King as to the Ward-holding, more than an ordinary Consent of the Superior, and the next Retour will return the Lands *Ward*.

N. A Person being apparent Heir both in Land and heritable Sums, but not being served Heir; and being forefaulted after the Decease of his Predecessor: *Quæritur*, If he doth forefault not only the Lands but the said other heritable Estate? Answer, It is thought there is a Difference betwixt Lands, and any other heritable Estate; seeing the apparent Heirs is obliged to enter to his Lands, to the Effect the Superior may have a Vassal liable to Service or other Duties; so that his not entering is *delictum, vel quasi*; and the Lands are in Non-entry: And he is in the same Case in Relation to the Superior, as if he were entered: Whereas, as to any other heritable Estate, he needeth not own or claim the same but if he pleases; and he cannot have Right unless the same be settled upon him by a Service: And consequently cannot forefault that which is not his. *Vide supra*, in the Question concerning *Cesnock*'s Forefaulture.

S. If

[illegible] to Sums; for that the Difference lies not here, that [illegible] of the Forfaulture that claims whatever might have fallen to the Apparent Heir forfeited; notwithstanding of the Author's laudable Moderation.

N. A Bond being granted to an *English* man, but bearing Registration in *Scotland*, and being granted by a *Scotsman*: If the Person Creditor be guilty of Treason, Whether it will fall under Forfaulture in *England*, or *Scotland*?

S. It will fall under his Forfaulture in *England*.

N. Cum essent Sempronio duo filii, primogenitus, patre adhuc vivo, perduellionis damnatus fuerat: postea, patre mortuo, utroque filio superstite (nam perduellis fugâ se subduxerat) de hæreditate Patris ambigitur, an ad primogenitum & ex ejus persona ad fiscum pertineret? Nam jure civili, quod indigna auferatur fisco quæritur. Et jure nostro, hæres apparens Majestatis damnatus, nedum sua, sed bona hereditaria, & prædia quæ sua forent, si edita esset hæreditas, amittet, & ad fiscum transferet.

Sed distinguendum & multum interest, an filius, præmortuo patre, crimen postea admiserit; an verò (ut in casu prædicto) ante patris obitum Majestatis reus & damnatus sit: priori casu, cum primogeniti persona adhuc integra sit, confestim a morte patris dies cedit, & hæreditas ei delata est; adeo ut qui etiam patre superstite hæres fuerat in spe, jam desipit hæredem esse habitu, & spe certa & radicata, cum libuerit actu & aditione hæres futurus: Si igitur postea maximam Capitis diminutionem patiatur, hæreditas ipsi delata, & jus succedendi in fiscum transit? Altero verò casu, filio ante mortem patris damnato, hæreditas patris morte nec delata est, nec deferri potuit, utpote pœna servo, & qui in jure nullus, nec personam habeat in qua successionis jus radices agere queat: his consequens est, fratrem juniorem patri hæredem fore; quia absurdum esset, patrem a crimine alienum, & forte tam suis quam familiæ meritis commendatum, ex delicto filii nihil amittere dum viveret (noxa enim caput sequitur) morientem autem tum bona tum familiam & memoriam perdere: Nec perduellis aut fisci melior debet esse conditio, quod damnatus pœne sit subfrueterit: & extra quæstionis aleam est, secundogenitum patri hæredem futurum, primogenito patri præmortuo.

2da. In ista specie facti suboritur quæstio, viz. Si venia date restituatur primogenitus, an frater desinit esse hæres? Et quidem distinguendum est, 1mo. An cum restituitur, hæreditas integra & ex ejus adita sit, fratre ex inquisitione hærede renunciato, & ex omnibus quæ patris fuerant prædiis investito (tum enim terræ in hæreditate sunt, ante investituram haud censetur esse aditio) isto casu, restitutio quæ est ex gratia, neminî nocet nisi concedenti; nec admitti jus fratri quæsitum: & quod rite constitutum & quæsitum est haud corruit, etsi casus evenerit a quo incipere non poterat.

2do. Sin restituatur primogenitus, hæreditas nondum ullatenus edita; eo casu quia res adhuc est integra, & sublato vitio per restitutionem, qui oberat ne hæres esse posset; incipit hæredem esse habitu, & aditione actu hæres erit.

[illegible] propones here a Case in *Latin*. [illegible] had two Sons; The eldest, in his Father's Life, is found guilty of Treason; but both being alive at the Father's Death, the Question is, *Who succeeds?* The Second, or the First? And he puts a Difference of the Second's committing the Treason *after* the Father's Death, or *before*: For, if after, then he was *Hæres habitus*, and so forfeits to the Fisc; but before, the Succession could not devolve upon him, and therefore must fall to his younger Brother, specially since it were hard in this Case to make the innocent Father forfeit his Estate. But tho' this Reasoning be probable, yet the Rigour of Forfeitures would have prevailed.

The Second Question, is, *If a Remission should be granted to the eldest, would this restore him against his Brother?* But this supposes the Brother to have succeeded; which in the Rigour of Forfeitures could not be; but if he had succeeded, the elder Brother's After-Restitution *ex gratia* could not prejudge the younger Brother entered; but if at that Time the younger were not entered, the elder, upon his Remission, might enter.

The Author puts a farther Case of the younger Brother's being served before the elder's Succession; but being only infeft in Part, and not in all the Lands when the elder got his Remission. And *he* divides the Succession to the younger for what he is infeft in, and to the elder for what remained: But in good Law the younger being first served in special, and to all the Lands, should carry all of them notwithstanding of the interveening Remission; for, it is the *Service* that gives the Right, and what follows is but Execution.

Thus I have gone through the Author's Title of Forfeitures, writ, no doubt, before the Act of Parliament 1690, which so much the more commends the Author's Moderation, that Forfeitures were then in their Rigour and Vigour. But the said Act of Parliament hath now regulate this whole Matter of Forfeitures, as to *Creditors*, *Vassals*, and *Heirs of Tailzie*; and yet not so throughly as might have been expected after the great *Abuse* of Forfeitures. The Act statutes and ordains, *That no Forfeiture shall prejudge Tacksmen, Creditors, Superiors, or Heirs of Entail therein mentioned, nor Husbands or Wives of the Persons forfeited, but that all Tacks clad with Possession before committing of the Treason, where the Treason is* open and notour, *or before Citation in the Process of Forfeiture, where the Treason is* latent, *shall defend against the Forfeiture of the Setter.* But what Reason for the Distinction, if the Tack be set before the committing of the Crime, and Possession duly apprehended before Sentence: For these seem to be the *juster* Measures, tho' Possession be not apprehended before the *Crime* when notour, or before *Citation*, when latent.

Then the Act adds abruptly: *The Debts being always upon record, by being registrate or Diligence done thereon*, but expresses not distinctly, if this *Recording* of Diligence should be, as in the Case of Tacks, before the *Crime* when notour, or before *Citation* where the Crime is latent, altho' this appears to be the Meaning, but without any Reason; for,

for, if the Debt be lawfully contracted before the Crime, and the Creditor wholly innocent of the Crime, it is hard that he should forfeit his Debt for not Recording; a Point arbitrary to the Creditor, and not enjoined by any Law.

The Act goes on, *And that the Estates forfeited shall be subject to all Real Burdens and Claims affecting the same, whether the not exacted nor insisted in within the Six Years preceeding the Forfeiture.* And this takes off indeed the Rigour of the Quinquennial Act 1594. Parl. 9. Cap. 2. But then it *excepts bygone Annualrents, Liferents, and other annual Prestations, for which no Diligence done within the said Five Years.* But what Reason for this *Exception*, when nothing more ordinary nor innocent than to forbear exacting of these Annues and Prestations, specially when the Right thereof is commonly so well established.

Then the Act goes on. *The Estates forfeited shall be subject to all true and lawful Creditors, whether Personal or Real for their principal Sums allenarly.* But why not also for their bygone Annualrents? If, as it follows in the Act, *their Debts and Claims be contracted and founded prior to the committing of the Treason, where the Treason is open or prior to the Citation where the Treason is latent*, as was above distinguished. But here there is no Word of *Recording*, which seems to be required above: And in effect this Part of the Act seems to be rather the *Rule* for Debts than what is above said about *Recording*.

The *Act* subjoines an Exception of Debts contracted after the open Rebellion and Rising in Arms: But that Exception was not needful, because not *de regula*; which is only of Debts contracted before the Treason, when open and notour.

The *Act* goes on, *That forfaulted Estates shall likewise be subject to all the Casualities due to the Superior, either before the Forfaulture or thereafter, by opening the Fee: And that in the same Manner as if the said Tacks, Actions, Debts and Casualities had been set, raised, contracted, due, and confirmed under the Great Seal, before committing of the Crime.* And this Clause has a Retrospect upon all above: But what should be meaned by Casualities due to Superiors, either before the Forfaulture, *or thereafter by opening the Fee?* Certainly, this *Thereafter by opening the Fee*, if by the Forfaulture, requires a Distinction. But then the Act again *excepts annual Prestations*, which is above said to be groundless.

As to *Taillies*, The Act secures them, if registrate, conform to the Act of Parliament 1685: But what it adds, *That the Deed whereby a Faculty reserved in a Tailzie is exerced, should be insert in a publick Register, or contained in a Contract of Marriage*, is groundless; since the Deed may be lawful, and also innocent, tho' neither in a Register, nor in a Contract of Marriage. But *see the Act*; for in this Part of it there are also Words wanting.

But upon the whole, it had been a shorter and clearer Act, To discharge the Pain of Forfaulture, even in Treason: For *Death* and *Escheat* seem to be sufficient in all Crimes; and Escheat also *with* Death, too much; seeing *Death* may justly be reckoned the *sufficient* as well as the *just* Punishment of any Crime whatsoever: And what more is inflicted, doth only affect and afflict the *innocent*, but signifies nothing as to the restraining of the Crime. And this appears to have been the Law of GOD, That the *Son* should not suffer for the *Father*'s Transgression.

N. [illegible]

S. No Provision to a Child, whether in Heritable or Moveable, imports *Forisfamiliation* to exclude from claiming a Part, unless it be expressly given in Satisfaction: And when not given with that Quality, the Bairn's Part may be claimed: But with this Difference, That if the Provision be in Lands to a younger Son or Child, it seems not intended to be collated; but if it be in Money, suppose heritably secured, it should be collated. And this appears from the Nature of the Subject: For, when a Man provides Money, he *principally* intends the Money, and not the Security: But when he provides Land, he seems to give it *per modum præcipui*, as given from his Heir, and not to be collated.

'Tis true, a Man's Heir in Lands may offer to renounce and collate, that he may draw his Part of the Executry with the younger Children, if he think *that* better: But there he hath no Interest in the Executry, until he Renounce: Whereas in the former Case, a younger Son provided to Lands, hath still an Interest in the Executry, unless it be intended that he should be excluded, either by an express Exclusion, or that which seems to be implied in the Nature of the Provision.

Funeral Charges.

N. IF Funeral Expences should be deduced as a Debt off the whole, or only off the Dead's Part?

If the Funeral Charges for Burying the Husband, should affect the whole moveable Estate, or the Dead's Part? ANSWER, It should affect the Dead's Part; seeing it is not a Debt contracted during the Communion: And the Dead's Part cannot be used or imployed better than to Bury him.

If the Funeral Charges should be deduced in relation to the Quot, so that the Quot should be only of the Dead's Part free of the said Debt? ANSWER, It is thought, it should not be deduced, for the Reason contained in the preceeding Query.

S. FUNERAL Expence should be deduced as a Debt off the *Whole* of the Executry, and not *only* of the Dead's Part, for it is a Debt of Nature and privileged to all other Debts.

FUNERAL Charges for burying a Husband, the Author says, should affect the *Dead's Part* only, because not a Debt contracted during the Communion; but it was indeed contracted long before, *omni ratio moriendum est*, and was undoubtedly the Husband's Debt, even during the Communion. And thus if the Wife should die before the Husband, her Funeral Charge is also to be deduced off the Whole.

THE Quot is now discharged; but if it were not, the Funeral Charge would fall to be deduced as any other Debt.

G. G.

G.

Gestio Hæredis.

N. IF an appearand Heir meddle by entering to the Possession of Lands whereof the Defunct was in Possession; but his Title is found thereafter to be void: Will his meddling import *Behaviour & additionem passive.*

S. THIS Title should be more properly *Gestio pro hærede.* If an apparent Heir intromet with Lands in the Defunct's Possession, it presumes against him; but if the Defunct's Title were found to be void, the Presumption should also evanish, even tho' the Intromission were more penal than it is.

Gift.

N. THE late King having granted to a certain Person the Gift of an Office at His Majesty's Presentation; there is a Gift of the said Office granted to another Person by one having Right by a late Gift to present to the said Office; notwithstanding that the Person who had the former Gift *ad vitam* or *culpam* is yet living and is not deprived: And it is now desired, that His Majesty should not only ratify the said late Gift, but that of his certain Knowledge, proper Motive, and by vertue of His Prerogative He should give a new Gift of the said Office; revoking and annulling the former Gift granted by the late King to the present Incumbent; and giving Power to the Person to be presented by the new Gift, to enter presently to the Exercise and Benefit of the said Office, by himself and his Deputes: And ordaining the present Incumbent to deliver up the Registers; and recommending to the Lords of Session to construct His Majesty's Gift with the greatest latitude that their *Nobile Officium* can allow: And containing a Promise to ratify in Parliament.

Quæritur, Whether a Gift of the Tenor foresaid be according to Law? *It is answered*, That the samen is altogether against Law and Form, for these Reasons.

1*mo*. BY the common Law there can be no valid Gift of an Office or Place, unless the same be vacant, and the Manner of Vacation expresst in the Gift; seeing the Office belonging to another who has Right to and in Possession thereof, the same is not in the Hands and Power of these who has Right to present, so that they may give the same. 2*do*. If it be pretended, that it may be taken *periculo petentis*, and that the Incumbent may be thereafter deprived or may decease; and that the Gift may be effectual in either of the said Cases: Such a Pretence is both against Common Law and our Practique; seeing it imports *votum captandæ mortis*: And, by an express Act of Parliament, Gifts of Escheat should not be given before they fall by Horning: And there is the same Reason as to all other Gifts. 3*tio*. That a former Gift granted, by the late King, who undoubtedly had Right to give the same, should

be revoked and annulled without a previous Citation of the Person concerned; and without so much as a Hint of any Reasons why this Right should be taken from him; is a Streach not only against Law and Form but against Humanity and Justice, which is defined *Jus suum cuique tribuere, & neminem lædere. 4to.* That, what cannot be done in Law and Justice, should be desired to be done by vertue of His Majesty's Prerogative, is an Injury to so just a Prince; and it is of a dangerous Preparative that His Majesty's Prerogative should be pretended for Favours to private Persons, that are unjust and illegal. *5to.* Whereas it is desired, that it should be recommended to the Lords of Session to construe His Majesty's Gift, if it should be granted, and if there should be any Question upon the same; with the greatest Latitude that their *Nobile Officium* may allow; the said Desire and Stile is illegal, and without any Precedent; and should not be a Precedent hereafter: Seeing there ought to be no Prelimitation upon the Lords of Session: And it is their Duty, and may be expected from them, that they will construe His Majesty's Grants according to Law and Justice: And their *Nobile Officium*; being as the highest Judicatory, to do Justice according to Law, they have no Latitude to recede from the same.

S. A Gift of an Office being granted by the King *ad vitam aut culpam*, another gets Right by a latter Gift, to present to the said Office, the first Donatar being still on Life undeprived, and it seems the King has been prevailed with to ratify this second Gift and revoke the former, and to *desire* the Lords to interpose their Authority, and likewise to *promise* to ratify in Parliament. The Author *justly* says, That this second Gift is against Law and Form. And 'tis like the Case may be remembred.

Gift of Escheat with Backbond.

N. IF a Backbond do so affect the Gift of Escheat, that the Donatar cannot assign the same?

S. THE Donatar cannot assign the same but with the Burden of the Backbond?

Gifts of Forfaulture.

N. LANDS being disponed by His Majesty, as being in his Hand upon Forfaulture, conform to a certain Decreet of Forfaulture mentioned in the Right, with the Clause *Cum omni jure*; and the King having, the time of the granting the Disposition, Right to the Land as being in his Hands for committing another Deed of Treason after the former; whereupon there was not a Decreet the Time of the Disposition: *Quæritur*, If the said former Decreet be taken away, Whether the Donatar will have Right to the Lands upon the supervenient Deeds, and new Decreet of Forfaulture following thereupon? *Ratio Dubitandi*, The said Right is upon a special Ground; & *causa limitata limitatum producit effectum*. And the Clause *Cum omni jure* is only *clausula executiva*; and is only to be understood of inferior Rights to Mails and Duties, by Reason of Ward, Nonentry, or otherwise; and not of the Right of Property upon other Grounds.

S. THE

S. Tho' this may be doubted in ſtrict Law, yet the King's Gift ſhould be amply underſtood: And if the Second Forfaulture was incurred, tho' no Decreet thereon the Time of the Diſpoſition, it may be thought, That the Gift ſhould ſtill hold, as given *cum omni jure*; and, That the Donatar may, by Vertue thereof, proſecute the *new* Treaſon, to have the ſame declared for farther Confirmation of his Gift.

Gift of Recognition.

N. A Gift of Recognition, bearing Lands holden of the King Ward to have been diſponed, but not ſpecifying the ſame; or ſpecial as to the Lands, but not as to the Perſons in whoſe Favours the Diſpoſition is made: If it will be valid?

S. A Gift of Recognition of Lands in general, as holding Ward of the King, but not ſpecifying the ſame; or, tho' *ſpecial* as to the Lands; yet not expreſſing the Perſon in whoſe Favours the Diſpoſition is made, that is, the Perſon to whom the Lands were unduly diſponed; the Gift is imperfect; and 'tis ſcarce thought that ſuch a Gift could be granted: But it ſhould not be regarded, unleſs renewed.

Gift of Ward.

N. THE Superior having gotten a Gift of his own Ward, either to himſelf or to another for his Behoof, *gratis*: *Quæritur*, If the Sub-Vaſſals may claim the Benefit of the ſaid Gift, and to be free of the ſaid Ward? *Ratio Dubitandi*, That in effect the ſaid Gift is a Diſcharge of the Ward; which being diſcharged to the Superior is diſcharged to the Sub-Vaſſal, whoſe Property falls in Ward only conſequentially: And on the other Part, as the Superior and Donatar to the Ward, may take Advantage of the ſame both againſt the Vaſſal and Sub-Vaſſals; the Vaſſal ought not to be in a worſe Caſe than another Donatar.

S. When a *Superior*, or another to *his Behoof*, gets the Gift of his own Ward; his Vaſſals may juſtly claim the Benefit of it: For, tho' another Donatar might diſtreſs the Vaſſals, yet it ſeems contrary to the feudal Contract betwixt the Superior and his Vaſſals, that he ſhould take the Gift of his own Ward, and turn it upon *them*.

If Gifts of Ward and Non-entry prejudge ſingular Succeſſors.

N. THERE are ſome Caſualities which are Fruits of Superiority, and have *tractum temporis* as Ward and Non-entry, *&c.* And theſe being gifted will be effectual, during the whole Time of their Endurance; as to the Granter and his Heirs: But there may be queſtion as to ſingular Succeſſors: Whether the Donatar will have Right to the

Ward and Non-entry, for Years after the Giver is deceased; *Jure Dilitandi*; that *cedentes jura domini reſignare videntur in favorem*; and ſuch Gifts are of the Nature of Aſſignations to Mails and Duties, which are not effectual but during the Right of the Cedents; and the Ward and Non-entry do belong to the Superior by Reaſon he wants a Vaſſal to ſerve him; and the ſingular Succeſſor having that Prejudice, he ought after his Right to have the Benefit of the Caſualities. *Vide Liferent-Eſtheat. Quæſt. 7. in Lit.* E.

S. THIS true, that theſe Caſualities of Ward and Non-entry, have *tractum temporis* and will endure all their Time; but being like Aſſignations to *Liferents*, that transfer the Right; and not like Aſſignations to *Mails and Duties*, which are but *annual Ceſſions*, they will operate againſt the ſingular Succeſſor.

Goods belonging to Rebels at the Horn.

N. A Creditor having affected the Moveables of the Defunct, by confirming himſelf Executor Creditor; and having got Poſſeſſion of the ſame whereby he is ſatisfied of his Debt: *Quæritur*, If the ſame may be evicted from him by a Donatar to the Defunct's Eſcheat? ANSWER, It is thought, they cannot be evicted: Seeing, *in favorem commercii*, Goods belonging to Rebels may either be diſponed and given by themſelves in Payment of their Debt, or poinded or otherwiſe affected, before Declarator and Diligence, done by the Donatar to affect the ſame.

S. A Creditor having affected the Moveables of a Defunct by *confirming*, and having got *Poſſeſſion* of the ſame, whereby his Debt is ſatisfied; a Donatar to the Defunct's Eſcheat cannot evict them. For, *Firſt*, A Gift of Eſcheat is reckoned but a Step of Diligence, and hath only Preference as it is proſecuted. And *Secondly*, *Qui ſuum recepit, conditione non tenetur*. And thus a Rebel may even by himſelf diſpone for Payment of Debt, much more may his Goods be poinded before Declarator.

Grana Creſcentia.

N. WHAT is the Reaſon for the Aſtriction of *Grana creſcentia*? ANSWER, Feuars are in Effect *Coloni* and perpetual Tackſmen; and they ought not to be in better Caſe than Tenents, whoſe *Grana creſcentia* were upon the Matter thirled, the Food and Expences of Labouring being deduced, it is thought the Tenent will have no more than will entertain him.

S. Grana Creſcentia, in an Aſtriction, includes the Limitations of Food, Seed, Expence of Labour, and Teind.

Great Seal.

N. A Gift of the Eſtate belonging to Baſtards or forefaulted Perſons whereupon there was no Infeftment, being granted under the Great

Great Seal: *Quæritur*, Will it be valid? *Ratio Dubitandi*, The ordinary way of paſſing ſuch Gifts is under the Privy-Seal.

S. A Gift of Baſtardy, or Forfeiture, whereupon no Infeftment needful, tho' paſt under the *Great Seal* is yet valid, albeit the *Privy-Seal* is the ordinary way; for *Majus* here may be ſaid *includere minus*.

H.

Heirs.

N. A Child being ſerved Heir to his Mother, and thereafter the Child's Father being ſerved Heir to the Child: *Quæritur*, If he can be ſaid to be Heir of Line to his own Wife, and ought to be diſcuſt before other Heirs?

S. The Father here, appears to be Heir of Line by Progreſs to the Mother, as the Child was *immediately*; and ſo ought to be diſcuſſed before other Heirs.

N. A Woman being married to a Baſtard, and having a Child; *Quæritur*, As the Child will ſucceed to the Mother, whether the Child having no other Heirs, his Father being a Baſtard, (ſo that he cannot have any *Cognati* upon the Father's Side) will his Mother be Heir to him? *Ratio Dubitandi*, That by the Common Law the Mother does ſucceed; and as the Child does ſucceed *Ratione Cognationis* and Relation to his Mother, it ſeems that for the ſame Reaſon ſhe ſhould ſucceed to him, the Relation being mutual.

S. The lawful Child of a Baſtard will ſucceed to the Mother. And if the Child die, his Father, tho' a Baſtard, may be his Heir, (*ſee Baſtard, above*) but not the Mother: For, with us, there is no Succeſſion *ex parte matris*; and the Reaſon of *Cognation* betwixt the Mother and the Son, will not reciprocate.

N. Quæritur, If a Son of a former Marriage having Right to ſucceed by Subſtitution, in the Caſe where the Father provided Lands to the Son of a ſecond Marriage, and the Heirs of his Body; whilks failzieing, to the Father's other Heirs and Aſſignies, for implement of his Contract of Marriage: There being no other Children of the ſecond Marriage, muſt he be Heir to his Father; the Subſtitution being (as ſaid is) in Favours of the Father's Heirs? *Ratio Dubitandi*, That in many Caſes, the Word *Heir* to another Perſon than the Perſon *De cujus ſucceſſione agitur*, is to be underſtood *hæres habitu vel potentiâ & non actu*; as if upon Conſiderations a Brother ſhould paſs by his Brother of purpoſe, and failzieing his own Heirs ſhould ſubſtitute the Heirs of his Brother's Body: But in this Caſe, it would ſeem by the Obligement of the ſaid Contract of Marriage and the ſaid Right, he has intended that he ſhould be repreſented himſelf, failzieing the Heirs of

his Marriage. *Vide* the *Tenth* and *Eleventh* Questions in the Title *Successor* titulo Lucrativo, *Litera S.*

If that should be the Construction: *Quæritur, Quid Juris,* If the Son of the second Marriage should decease, the Father living: Seeing the Son of a former Marriage cannot be served Heir to his Father?

S. If the Lands were provided in Fee to the Son of the second Marriage, it does not appear how the Son of the first can succeed otherwise than as substitute to him by Provision; for he cannot succeed as Heir properly to his Father, who was not in the Fee, and no Need of a *Service* to make him Heir *designativè*. But if the Son of the second Marriage should decease, the Father living, then the Son of a former Marriage could not be at all served to his Father. But in this Case, as Heir *designativè* to his Father, he will succeed as Heir of Provision to his Brother, even in the Father's Life.

N. Lands being entailed to divers Person substitute, and the Heirs of their Bodies; whilk failzieing, to the other Heirs of Taillie *successivè*; *Quæritur,* If one of the said Heirs of Taillie be forfaulted before the Death of the Person in Fee, leaving Descendents of his own Body; whether will the next Heir of Tailzie succeed? *Ratio Dubitandi,* Because the next Heir who would succeed, failzieing the forfaulted Person and the Heirs of his Body, cannot be said to be *proximus*; seeing the Children of the Traitor are nearer: And though they be *nulli* and *mortui civiliter* they are not *naturaliter nulli:* So that they being incapable, and the others not having *jus sanguinis,* it may appear *quod nullius est pertinet ad Regem. It is thought,* that the nearest of Kin should exclude the Fisk; seeing *qui sunt nulli,* they are not to be considered as to any Effect; and especially in that which is odious and exclusive: And it is hard, that the Estate should be forfaulted by the Crime of a Person who had never Right to it.

S. By the Act of Parliament 1690, this Forfeiture could not prejudge the next Heir of Taillie. But if that Act had not been made, the Forfeiture of the said Heir of Taillie, tho' before the Death of the Fiar, would have made the Lands to forfeit, if ever the Succession had devolved upon the Person forfeited.

Behaving as Heir.

N. Quæ *Ratio,* That the owning a Title of Honour, and sitting in Parliament, doth not import *Behaving as Heir*; and yet the owning and intrometting with a Sword, or Armour, or any thing else, will import *Gestionem?* Answer, That Creditors being to be satisfied out of the Goods and Estate belonging to a Defunct Debitor; if the apparent Heir doth meddle with any Part of the samen; *eo ipso adit passivè, quia miscet se rei* which should be liable to the Executor's Execution: But a Title of Honour is not such an Interest as could be any Way liable to the Creditor; and the apparent Heir, in owning the same *non libat hæreditatem*

Quæritur, If a Ratification by any apparent Heir of a Right granted by the Person he was to succeed to, being yet on Life, will import *Gestionem? Ratio Dubitandi,* That he could not be Heir, nor *Gerere* during the Defunct's Lifetime. And on the other Part, The Ratification

is

is granted becauſe he is apparent Heir, and might queſtion the Right. And as One may be liable *paſſivè* by accepting a Right in the Defunct's Time, whereby he is Succeſſor *Titulo lucrativo*; ſo he may *Behove* by a Deed in the Defunct's Time.

S. The *Owning* a Title of Honour, and ſitting thereby in Parliament, doth not import *Behaving as Heir*; tho' the Intromiſſion with any Part of the moveable Heirſhip would do it. And the Reaſon is, That Honour tranſmits by the *Blood*, and not by *Service*; and Creditors can have no Intereſt in it.

A Ratification by an apparent Heir of a Right granted by the Perſon he may ſucceed to that Perſon, being ſtill on Life, will import no *Geſtion*; tho' if this apparent Heir had accepted a Right from the Defunct in his Time, it would have made him liable *paſſivè*, or *Succeſſor titulo lucrativo*: For, this accepting of a Right is *Præceptio hæreditatis*: Whereas the Ratification of the apparent Heir tranſmits to him nothing.

Heir of Conqueſt.

N. THERE being Three Brothers, and the middle Brother having an Eſtate, and deceaſing after the Deceaſe of his elder Brother, who had divers Sons; and the younger Brother being on Life: *Quæritur*, Who will ſucceed to the middle Brother as Heir of Conqueſt? *Ratio Dubitandi*, 1*mo*. The younger Brother being Heir of Line; and who would be Tutor to the Children of the middle Brother, if he had any; it may be doubted, if there ſhould be a Repreſentation in Conqueſt; the Heir of Conqueſt not being properly Heir? 2*do*. Conqueſt aſcending *gradatim*, Whether would the youngeſt or eldeſt Son of the elder Brother ſucceed as Heir of Conqueſt, being both collateral to the Defunct?

S. With us, The eldeſt Son of the elder Brother predeceaſed, would ſucceed as Heir of Conqueſt; becauſe there is a Repreſentation in Conqueſt: And as it would aſcend to the elder Brother if on Life ſo his eldeſt Son comes in his Place.

Diſcuſſion of Heirs.

N. A Perſon having provided his Eſtate to his Daughter, with Power to Diſpone and Redeem, is obliged, that if he ſhould make uſe of that Power in Prejudice of his Daughter, he and his Heirs Male, and Succeſſors in that Eſtate and Dignity, ſhould be obliged to pay a certain great Sum of Money at the Firſt Term after his Deceaſe: *Quæritur*, Whether his other Heirs or Executors, and not only the Heir Male, will be liable to pay the ſaid Sum, at the leaſt *in ſubſidium*; the Heir Male being Firſt diſcuſt?

Quæritur, *Quo ordine* a Succeſſor *Titulo lucrativo* ſhould be diſcuſt? Answer, It is thought, That he ſhould be diſcuſt before the Heir of Taillie, being in effect a general Heir: Unleſs Lands be diſponed to an apparent Heir of Taillie: In which Caſe he ſhould be conſidered as an Heir of Taillie.

WHEN the Order of Diſcuſſion is Renounced; If the Heirs of Taillie or Proviſion may have Recourſe for their Relief againſt the Heir General; who by Law, is Firſt liable to the Debts: Albeit as to Creditors that Order be renounced?

S. A Man having provided his Eſtate to his Daughter, with a reſerved Power to Redeem, obliging himſelf and his Heirs Male and Succeſſors *in that Caſe*, to pay a certain Sum of Money to the Daughter, after his Deceaſe; His Heir Male, upon Redemption, will be firſt liable to pay the Sum: But then his other Heirs and Executors will be likewiſe liable *in ſubſidium*; the Heir Male being firſt diſcuſſed.

THE Author ſays well, That a Succeſſor *Titulo lucrativo* is to be underſtood as General Heir, ſeeing he was *alioqui ſucceſſurus*; and ſo he would be underſtood as Heir of Taillie, if as ſuch he had ſucceeded by the like *Preception*, unleſs it ſhould be thought enough, to make him liable *in quantum*.

WHEN the *Order of Diſcuſſing* is renounced in Favours of a Creditor, the Creditor is obliged to obſerve none: But yet, the Heirs of Taillie and Proviſion, if diſtreſſed, will ſtill have Recourſe for Relief againſt the Heir General: For, as to him, they themſelves are in ſome Reſpect Creditors. But in good Law and Reaſon, a Creditor ſhould be obliged to obſerve no Order of diſcuſſing: He takes his Debitor bound, Perſon and Goods, and all that Repreſent the Debitor ſhould be equally liable to *him*, whatever Relief they may have among themſelves. And ſo, betwixt *Heir* and *Executor* there is indeed no Order; albeit they have their Relief the One againſt the other.

Heir and Executor.

N. GIFTS of Ward, Marriage, Non-entry, do theſe belong to the Heir or Executor? ANSWER, They are *in rem*, and ſome has *tractum*, and therefore belong to the Heir.

S. A Gift of Ward or Non-entry in the Donatar's Perſon, tho' it have *tractum temporis*, falls under the Donatar's moveable Eſcheat; and therefore, it may be thought, ſhould fall under Executry, the Executry being rather broader than the ſimple Eſcheat as to it's Extent in Moveables: But for the Gift of Marriage, if the Marriage be declared and the Avail found, it is thought to belong to the Donatar's Executors; and even tho' it were not declared, it is the *Gift* that makes the Right, and tho' the Ground may be poinded for the Avail decerned, it militates not againſt the Executor's Right. But this Queſtion has been touched before, and how theſe Caſualities do fall when in the Superior's Perſon and not gifted, hath been alſo above conſidered.

N. A Perſon being obliged by a Bond to diſpone Lands for a certain Price, and the Creditor having charged upon the ſaid Bond, and being content to pay the Price, and in the *interim* the Debitor deceaſing: *Quæritur*, If the Creditor obtain a Decreet for implementing againſt the Heir, whether the Party bound to diſpone, his Heirs or Executors will have Right to the Price? ANSWER, It is thought, that the Heir will have Right; ſeeing there is no Sum due to the Party bound; but if he diſpone, which is only *in obligatione*, the ſaid Sum becometh due upon his

his Diſpoſition; and is not due to any but to a Perſon who is to diſpone; and the Heir only can diſpone.

If by Contract betwixt the Parties one diſponed and is obliged to infeft in Lands, and the other is obliged to pay a Sum of Money as the Price. *Quæritur*, if the Seller deceaſe before the Diſpoſition be fulfilled, whether the Seller's Heirs or Executors will have Right to the Price? *Ratio Dubitandi*, the Heir only can fulfil, and therefore ought to have the Price; and on the other Part, the Heir is liable to fulfil by the Diſponer's Obligement: But the Diſponer having taken an Obligement to pay the Price in Favours of himſelf, his Heirs and Executors, the Sum by the Act of Parliament ſhould pertain to the Executors; and it appears that the Diſponer, in place of his Lands, intended to have a perſonal and moveable Eſtate.

What is the Reaſon of Difference betwixt the laſt and former Caſe? Answer, In the laſt, there is a moveable Obligement for Payment of Money: And in the other, there is no Obligement upon the Creditor, but upon the Debitor to diſpone; but ſo far if the Diſpoſition be made, a Sum is to be payed, which cannot be payed but to the Diſponer's Heir after his Deceaſe, who only can diſpone, the Debitor's Executors can have no Right to the ſame; and it was in the Creditors Option to charge for Implement or not, ſo that the Money was not *in Obligatione* but *in Conditione* or *modo*, if Implement ſhould be craved.

These *Queſtions* have been conſidered above. And 'tis thought, If the Seller had diſponed by a Diſpoſition a Part, and the Buyer had given Bond for the Price, that this Bond and Price would belong to the Seller's *Executors*; for the Seller followed the Faith of the Buyer, and took his Bond in Satisfaction of the Price, which is the ſame as if the Price had been payed to him, and which in that Caſe would fall to his Executors. *But*, the Bargain by Way of Contract may ſeem to have a different Import, for there the Seller's Heir muſt not only perform as he muſt do in the former Caſe; but the Buyer may be thought to have a Right to retain the Price, until he get the Diſpoſition on the Seller's Part *fulfilled*: But ſtill 'tis thought that the Right of the Price being *in obligatione*, will fall to the Seller's Executor, not to his Heir. And ſo the Difference betwixt this Caſe of a Contract and that of a Bond to diſpone, ſeems to be, That in the Caſe of a *Bond to diſpone*, the Price comes to be due *ex conditione* upon the Offer to diſpone, which is in the Creditors Power to exact or not; and therefore the Price ſhould fall to his Heir diſponing; but in the other Caſe *of a Contract*, the Price is indeed *in obligatione*, which makes it fall to the Diſponer's Executors, and yet it may ſtill ſeem hard that the Diſponer's Heir ſhould be obliged to perform, and the Price go by him, ſpecially when the Bargain was concluded by Way of *Contract*, which makes the Diſponer's Part and the Buyer's Part more connected than if the Bargain had been by a *ſeparate Diſpoſition* on the one Part, and a *Bond* upon the other. For, here the Diſponer's *Heir* remains ſtill Party Contracter, and can only charge for the Money, becauſe *he only* can offer the Diſpoſition.

N. When an Order of Redemption is uſed, and the Money conſigned, and thereafter the Perſon againſt whom the Order is uſed deceaſes; *Quæritur*, Whether the ſame will belong to his Heirs or Executors? Answer, It is thought, it ſhould belong to the Heir, for

the Reason foresaid in the last Case; [illegible] demption may be used against an apparent Heir; and if the said Heir should after Consignation decease, the Money would belong to any representing him, who had no Right; and therefore it can belong to no other but to the Heir, who should be thereafter served and infeft, and should renounce. And therefore it is thought, the Money being the Redeemer's Money, and upon his Hazard until Declarator, it is never Money of the Person against whom the Order is used until Declarator; and then being his *in specie*, is moveable, and belongs to his Executors.

If a Wadset be granted to a Man, and his Wife, and the longest Liver of them Two, and the Heirs of the Marriage, &c. and an Order of Redemption be used and declared against the Husband; and thereafter he decease: Whether in that Case, the Money consigned will be heritable, and ought to be given up to be employed for the Wife in Liferent, and the Heirs in Fee? Answer, *Affirmative*.

S. If the Person against whom an Order of Redemption is used, should die before it be *declared*; the Money will belong to his Heir, who *only* can renounce: But in the mean Time, the Money being in effect the Redeemer's, and consigned upon his Hazard, it is not properly his against whom the Order is used until Declarator: And then Declarator being obtained, it will belong to his Executor; that is, the Declarator being obtained against the Debitor in the Reversion. But if it be obtained (as the Order may certainly be used against an apparent Heir) it will not at all belong to him, far less to his Executor; but must remain consigned until there be an Heir in Case to renounce; and he renouncing, will get the consigned Money; and then, and no sooner, it will fall to his Executor.

A *Wadset* being granted to a Man and his Wife, and the longest Liver, and the Heirs of the Marriage, and an *Order of Redemption* being used and declared against the Husband; in that Case, the Money consigned ought to be re-imployed for the Wife in Liferent. But seeing the Money as to the Debitor in the Reversion becomes *moveable* after Declarator, tho' the Wife's Right of Liferent in the Wadset should be preferred in the Equivalent; yet it may be thought, that the Fee of the Money should fall to the Husband's Executors, as it would certainly have done if the Wife had not been concerned: And they should have it with the Burthen of the Liferent.

N. A Bond being *ab initio* heritable by Obligement to infeft, and Infeftment thereupon; and thereafter there being a Bond of Corroboration granted for the same Sum, but not heritable; bearing to the Creditor only his Heirs and Executors: *Quæritur*, Whether the Sum be heritable or moveable. *Ratio Dubitandi*, The same is due, both by an heritable and moveable Bond; and the moveable Bond being posterior, seems to be a Novation of the former, & *posteriora derogant prioribus*. *Et contra*, the said Sum is due still upon Infeftment, and the subsequent Bond is only *in accessorio*; so that *jus principale & primordiale* is more to be considered, as to the Question concerning the Nature and Quality of the Right.

S. If, in this Case the Bond of Corroboration were granted with Cautioner or [illegible] Security; it might be thought only accessory, and the Sum still remain heritable. But if the Corroboration contain no additional Security, it looks like a Novation, even tho' it may accumulate; for such may be thought his Mind who takes the Corroboration.

Heirs Male.

N. A Father, his eldest Son being Dumb, of purpose to exclude him, as being unable to manage, doth by a Bond of Tailzie settle his Estate upon another Son, and the Heirs Male of his Body; whilk failzieing, to his other Heirs Male; with a Provision, That his said other Son and his foresaids should be obliged to entertain the elder Brother: And if the said dumb Person should at any time have the Faculty of his speaking, he should succeed, and the said Bond should be void: *Quæritur*, If the Brother who has got the Estate decease before the elder, without Heirs of his Body; if the elder Brother would succeed to him, as Heir Male? Answer, It is so evident, that it was intended, that the elder Brother should not succeed, except in the Case foresaid, if he should have the said Faculty of his speaking; and the said Tailzie being made of purpose to seclude him: It is thought, that he cannot succeed by vertue thereof; and his Heirs Male is to be understood his other Heirs Male, by the dumb Person, who is excluded.

S. The Father seems to have intended by this Tailzie, to exclude the eldest Son, that he should not succeed even in the Case of the Brother's Decease without Heirs Male of his Body; but since it was not so expresly provided, the eldest Son may be thought to be *excluded* by the Father in the Case provided, and yet *restored* by the Law, in the Event happening, for it seems hard that this Exclusion should be extended farther than expressed.

Obligements in Contracts of Marriage in Favours of the Heirs thereof.

N. A Person being obliged by his Contract of Marriage with a Second Wife, to Resign certain Lands, for an Infeftment to himself, and the Heirs Male of the Marriage; and to employ also 60000 *lib.* for the Heirs of the Marriage; and his eldest and only Son of the First Marriage being bound by a Bond granted thereafter, for Implement of the said Contract of Marriage, in the same Manner as if he had been obliged by the Contract; and the Father having accordingly Resigned, and taken Infeftment; and the Son of the Second Marriage being Infeft as Heir of Provision, in the Lands provided, as said is, in Favours of the Heirs of the said Marriage: *Queritur*, If the Son of the First Marriage, being after the said Contract Infeft in the Fee of the Father's other Estate, will be liable to relieve the Heir of the Second Marriage of the Debts contracted after the said Fee, as Successor *Titulo lucrativo*; or being bound for his Father, as said is: Upon that Pretence, That his Father ought to perform the Obligements of the said Contract *cum effectu*;

riage should succeed as Heir in the said Lands; but not be free of his Debt: Or, That being free, the Father could the Lands for an onerous Cause. But if the Father had Lands provided by the Contract, without an onerous Cause elder Son his Fee; or had Resigned of Purpose to defraud the the Second Marriage; the Father would be liable *de dolo*, Deeds reducible; But the eldest Son being once liberate, by would not be liable.

§. It is evident, That these Debts contracted by the Father after the eldest Son's Fee, do not fall under the common Notion of *Successor ex titulo lucrativo post contractum debitum*: And yet on the other Hand they will affect the Son of the Second Marriage as Heir of Provision. And 'tis farther granted, That if the Father had disponed gratuitously the Lands which he was obliged to resign in Favours of the Heir of the Second Marriage, that Heir might reduce the said Disposition as in Defraud. But upon the Matter it appears, That the Father bound in the Second Contract of Marriage, as said is, was not farther bound in Law, than to Resign, as he did: And yet this resigning could neither hinder him to dispone upon the Lands for an onerous Cause, nor yet to contract Debt that would affect the same Heir of Provision. And the Son and Heir of the First Marriage being infeft, before either the Father disponed gratuitously in Prejudice of the Son of the Second Marriage; or, before the Father contracted the foresaid Debts, he could neither be liable in Warrandice to the Receiver of the said Disposition, nor for the saids Debts: So that all the Speciality in this Case must turn upon the foresaid Bond. And it may justly be thought, That the Design of it was to bind the Granter for Implement of the Contract, as if he had succeeded as Heir to his Father. Now if he had succeeded as Heir, the Heir of Provision forced to pay the said Debts after contracted, might have payed upon Assignment, and got Repayment against the said eldest Son and Heir, *&c.* But the construing the Import of the said Bond to be only that of a Cautioner, is the Ground of the Author's Opinion.

N. There being Heirs General, and Heirs Male, and of Provision; and Heirs of a Second Marriage, being provided by their Mother's Contract of Marriage to certain Provisions, whereunto they have Right as Heirs of Provision: *Quæritur, Quo ordine* will the Heirs of the Second Marriage be liable to Debts and Discussion? Answer, It is thought, That they being Heirs upon an Obligement, & *quasi creditores*, It would appear, That they should be liable in the last Place *in subsidium*, all others being discust.

§. But it were still juster, That *all* should be liable to the Creditors in so far as they are Heirs, without Discussion; and be left to seek their Relief among themselves: And there needs no Discussion before reducing a Disposition in Defraud.

N. In Contracts of Marriage, The Husband being for the moſt Part obliged to provide and reſign his Eſtate for Infeftment to himſelf and the Heirs Male of the Marriage; which failzieing, to his Heirs Male of any other Marriage; which failzieing, the Heirs Male of his own Body, the eldeſt ſucceeding without Diviſion: *Quæritur*, If the Husband ſhould reſign and take ſuch a Right upon Reſignation; but thereafter ſhould reſign in Favours of other Heirs: Whether the Heirs of the Marriage may queſtion the ſaid Alteration, and what Way? *Ratio Dubitandi*, That an Heir is *eadem perſona*, and cannot queſtion the Deed of the Perſon whom he repreſents. Answer, He is not ſimply Heir, but Heir of the Marriage: And as to Obligements in his Favours, he is Creditor. 2*do*. It is thought he may purſue a Reduction of the foreſaid Deed, as being in Prejudice of him as Creditor: Or he may purſue the Heir of Proviſion by the poſterior Right, for Implement of the ſaid Obligement.

Quæritur, When by ſuch Proviſions there are other Heirs ſubſtitute to the Heirs of the Marriage, Whether the Husband may alter the Deſtinations as to the ſaid other Heirs? And if he do, If they may queſtion the Deed? Answer, It is thought, That the Heirs of the Marriage are only *in obligatione*: And the other Heirs *in deſtinatione mariti*, which he may alter.

N. If a Man, after Reſignation made, and Infeftment taken, upon his Contract of Marriage in Favours of himſelf and the Heirs of that Marriage, ſhould again Reſign in Favours of other Heirs; the Heir of the Marriage, 'tis true, not being ſimply Heir, but as an Heir of Proviſion is, *quaſi creditor*, may purſue a Reduction of the ſaid Deed to his Prejudice: Or he may purſue the Heir of Proviſion by the poſterior Right, for Implement of the ſaid Obligement. But, ſo far as I can underſtand, Contracts of Marriage of this Nature, were of old judged only to be *Deſtinations*, which, being performed, were thought to be fulfilled, and even the Contracters ſatisfied, as preſuming that a Man would not cauſleſly alter a Deſtination in Favours of his own Heirs: So that thereafter the Man was left to his Freedom. But now the Heirs of the Marriage, as above, are ſtill reckoned Creditors *quoad* the Father and his Heirs General; and he cannot diſpone gratuitouſly to their Prejudice, which diminiſhes the Father's Power: And *Exheredations*, that were judged with us to be unaccountable, are wholly ſhut out. Nor can it be ſaid, That otherwiſe the Contract ſhould be no Security, ſpecially againſt a Second Marriage: For a Deſtination *performed* is a reaſonable Security betwixt a Man and his Children: And it cannot be thought that he could alter it without a Cauſe; or that even a Second Marriage ſhould biaſs him. And if this be not enough, there might be a ſpecial Proviſion made againſt this Hazard: But ſtill the Husband the Fiar ſhould have the free Uſe of his Property, and a free Arbitriment among his Children: For Children are much ſafer in the Hands of their Parents, than Parents are in the Hands of their Children.

It is farther Queried, *If in the Caſe of other Heirs ſubſtitute to the Heirs of the Marriage, the Husband may alter the Deſtination as to the ſaid other Heirs?* And it may juſtly be thought, That theſe *other Heirs* have only the *ſpes* of a Deſtination, and *no* Right of *Obligation*; and, That the Right of Obligation ariſes to the Heirs of the Marriage only by the Force of the Contract, and the Intereſt of the Parties Contracters.

N. A Person being obliged by Contract of Marriage to resign certain Lands in Favours of himself and his Wife in Liferent, and the first Male of the Marriage; whilk failzieing, his Heirs whatsomever: And likewise being obliged, that what he should get by his Wife, by any Legacy, or Right, or Assignation in her Favours, to secure and imploy the same to himself, and her in Liferent, and to the Heirs of the Marriage; which failzieing, to his Heirs whatsomever: And he having accordingly resigned, and taken Infeftment, to him and her, and the Heirs foresaid: And a Sum of Money having fallen to her, and being uplifted and discharged, both by him and Wife, before Inhibition; and thereafter there being Inhibition upon the said Contract at the Instance of certain Friends, at whose Instance Execution is appointed to follow: These *Questions* do arise; *1mo.* If notwithstanding the said Inhibition, he may dispone the Lands? Answer, He may dispone the same, being Fiar: And the Import of the said Obligement is, That the Right of Succession, as to the said Lands, should be secured to the Heirs of the Marriage, incase the Father should decease in the Fee of the same; so that he cannot provide them to other Heirs: But it is not intended thereby, that the Father should not have the Right competent to all Fiars, *viz.* That they may dispose of the same, if their Condition requires.

Quæritur, If he may at least dispone the same without an onerous Cause? Answer, It is thought not, seeing all Obligements should be understood, *ut actus valeant & operentur:* And though the Father be Fiar, his Fee is by the said Obligement so restricted in Favours of the Heirs of the Marriage, that he cannot, fraudulently, and to evacuate the said Obligement, dispone without an onerous Cause.

If the Inhibition will be effectual as to the Sum *e. g.* of 10000 *lib.* never imployed? Answer, It will be effectual as to the Wife: But as to the Heirs of the Marriage, there may be Question. *Ratio Dubitandi*, that there being an Obligement, it ought to be once fulfilled by Imployment to him and his Wife, and to the Heirs of the Marriage: And on the other Part, seeing notwithstanding the Inhibition he might have disposed of the said Sum, if it had been employed; there is *eadem Ratio*, if it be not imployed; seeing his Condition may be such, that he cannot imploy the same.

If it be not to be considered, what truly his Condition is? And if it be such that he cannot imploy the said Sum without Ruine; that he should not be obliged to imploy it *Dicis Causa* to be thereafter uplifted? And if a Process may be intented against his Children, to hear and see it found and declared, that he should have Power to dispone notwithstanding of the said Inhibition and Obligement foresaid, both as to Lands and Money? Seeing if the Money were employed, he could, and might dispose of the same, being Fiar: And he is not in that Condition to raise the said Sum, and employ it.

S. It is already said, That neither the foresaid Obligement nor Inhibition will hinder the Husband to dispone for an onerous Cause; all the Import of the Obligation being, that he may not dispone *gratuitously* or *fraudulently*, in Prejudice of the Heirs of the Marriage. But it may be farther questioned, If every *gratuitous* Disposition should be judged *fraudulent:* For it seems hard, that in this Case, a Husband being Fiar of an opulent Estate in Lands, may not dispone freely, at least upon some Parts of it, when it is not with a Design to *defraud* the Heirs, but out of a just and reasonable Use of his

Fee

Fee. And indeed, unleſs the gratuitous Diſpoſition were either, of the Whole, or of a greater Part, or, if it had not ſome other Mark of Fraud; I ſhould not judge it fraudulent in Prejudice of the Heirs of the Marriage.

The Author *ſuppoſes* a Sum, as 10000 l. to have come by the Wife, but not imployed; and *thinks*, the after-Inhibition ſhould be effectual as to the Wife: But as to the Heirs of the Marriage, 'tis true, that by the Obligement it ought once to have been imployed in the Terms of it. But ſince notwithſtanding thereof, he might have diſpoſed upon the Sum for onerous Cauſes, if it had been imployed; his Creditors may on the ſame Account hinder him to imploy it notwithſtanding of the Inhibition.

The Author goes on to inquire, If the Husband may not raiſe a Proceſs againſt the Bairns of the Marriage, for declaring of his Power to diſpone notwithſtanding of the ſaid Obligement and Inhibition upon it? But this Proceſs ſeems needleſs; for the Inhibition can only hold in ſo far as the Obligation binds: And ſince it binds not either as to onerous Deeds or againſt Creditors, the Inhibition will not hold, and the Proceſs is unneceſſary.

But all theſe Difficulties ariſe by making the Deſtinations in Contracts more ſtrict than they were of Old; for thereby, tho' a Son of a Marriage diſpleaſe his Father never ſo much, he cannot put his Eſtate by him unleſs he ſell: And on the other Hand, let the Son be never ſo dutiful, the Father may both ſell and ſpend at his Pleaſure. So that ſtill it ſeems more agreeable to Law and Reaſon, that Deſtinations even in Contracts of Marriage, as to Heirs of the Marriage, ſhould only be to make the ſame; and that being once made, the Father ſhould be free; for, in effect, in theſe Caſes, the Wife is only the Party *& in obligatione*, and the Heirs merely *in deſtinatione*. However, our Pratique runs otherwiſe.

Heirs Portioners.

N. WHEN Women ſucceed as Heirs whatſomever (*v. g.* Three Daughters) they ſucceed as *Heirs Portioners*, without any Privilege of Primogeniture. *Quæritur*, If the Three Daughters ſucceeding be deceaſed, leaving each of them Sons and Daughters; Will the eldeſt Son of any of them exclude the reſt of the Children, and be Sole Heir Portioner to the Grandfather? *Ratio Dubitandi*, As Primogeniture is introduced for the Preſervation of Families, which does not militate *in ſucceſſione Fœminea*, Women being *finis & caput Familiæ*; there ought to be no Reſpect to the ſame in the ſecond Degree, *& nepotibus*, as there is not *in primo gradu in filiabus*: There being *utrinque eadem Ratio*.

Where there is a Plurality of Heirs Portioners, and ſome of them become *Lapſi*: May the Debt be recovered *in ſolidum*, from theſe who are Reſponſal?

If a Barony deſcend to Heirs Portioners, will all have Right of a Barony?

If any Superiorities belong to the Barony, will the eldeſt only be Superior?

S. Three Daughters having ſucceeded as Heirs Portioners, if any of the Three deceaſe, leaving both Sons and Daughters, her eldeſt Son

only will represent her, and come in place of their Parent to the Grandfather. And there appears no Reason why the Auditor should incline to bring in all the Sons and Daughters of the Daughter deceased *equally*; because forsooth their Mother was but an Heir Portioner, there being manifestly *disparatio*, where one of the Daughters leaves a Son.

If some of the Heirs Portioners become *lapsi*, the Debt may be recovered *in solidum* from these who are responsible; for the whole Heritage is liable to the Creditor: And, if it fall to more Heirs, it should not prejudge him: Nor ought he in this Case to be charged with Negligence; so that any of them being responsal, should still be liable to him, without Prejudice to their Relief, as accords: And it was their Part to have foreseen the Hazard, even before any of them became irresponsal.

If a *Barony* should descend to Heirs Portioners, it may be thought, That all of them will have Right to the Power of *Bailliery*; but the *Dignity* of a Baron should remain with the eldest: For, if any Superiorities belong to the Barony, they would only fall to the eldest Heir Portioner; and there seems to be *eadem ratio*.

Heirs of Provision and substitute.

N. WHATEVER belongeth to a Defunct in Fee and Property (whether Land or any other Interest) the Time of his Decease, cannot be transmitted but to Representatives; or these who are *instar heredum*, and *bonorum possessores*, as in the Case of Lands provided to Bairns of the Marriage, the Bairns are in effect Heirs of Provision: And if Sums be provided by Way of Substitution to another Person, after the Decease of the Creditor; the Substitute will be liable to the Creditor's Debt, other Heirs being discussed.

Heirs of Provision being oft-times Strangers, and *in re certa*: *Quæritur*, Will they only be liable *secundum vires?*

If a Right of Lands be given to a Person, without Mention of his Heirs; and, failzieing of him by Decease, to another and the Heirs of his Body: *Quæritur*, Will not the said Person who is so substitute be Heir of Taillie? And if it be so in Lands, why not so in Bonds granted to Persons, and failzieing of them by Decease, to other Substitutes?

S. Whatever a Man hath in Fee or Property he transmits to his Representatives; but Provisions in Contracts of Marriage, sometimes to Heirs or Bairns; sometimes to Heirs of the Marriage; sometimes to the Bairns of the Marriage. Now, suppose Lands be provided to the *Heirs* of the Marriage: It is not doubted but that the eldest Son of the Marriage will succeed in the whole Land-Estate. What then if the Lands had been provided to the *Bairns* of the Marriage? Can it be thought, That Sons and Daughters will come in as Heirs Portioners of Provision; and so in Case the Provision of Lands had been to the Heirs or Bairns of the Marriage. It is thought the eldest Son in all these Cases would succeed: For there appears to be *par ratio*: And the Variation is more from Stile than the Intention of Parties. But if the Provision were of *Sums of Money*, either to the *Heirs* of the Marriage only, or to the *Bairns* of the Marriage only, or to the *Heirs or Bairns* of

Heirs of Taillie.

N. Quæritur, IF there be no heritable Eſtate belonging to an Heir of Line, out of which the Executor may be relieved of heritable Debts; Will the Heir of Taillie be obliged to relieve the Executor of ſuch Debts? *Ratio Dubitandi,* Heirs of Taillie are not properly Heirs; but *honorum poſſeſſores*; and liable to Debts only *in ſubſidium*: Whereas the Heirs of Line and Executors are properly Heirs: And the Heir of Line, if the Executry be great, and more conſiderable than the heritable Eſtate, may *Confer*: Which is not competent to the Heir of Taillie or Proviſion.

THE ſame Queſtion may be betwixt an *ultimus hæres* and the Executor nominate of a Baſtard legitimate.

Hæreditas being *ſucceſſio in univerſum jus*: *Quæritur*, Why is an Heir of Taillie called *Hæres*, who ſucceeds only *in rem particularem*, as *Fundus*? ANSWER, He ſucceeds *in omne jus talliatum, & non ſingulari titulo*; but as repreſenting the Defunct *in ea re*: *Et non intereſt*, whether there be any Thing *in hæreditate quando hæres ſuccedit eb jure*; *& majus & minus non variant ſpeciem*.

IF, after a Perſon has ſucceeded as Heir of Taillie to a certain Barony, the ſame be evicted; Whether will he be liable to the Defunct's Debts? *Ratio Dubitandi, Semel hæres ſemper hæres*; *& ſibi imputet* that *adit damnoſam hæreditatem*. On the other Part, the Heir having ſucceeded, and having contracted *quaſi aditione* with Creditors; *intuitu*, that the ſaid

[illegible]

Or, If [illegible]
and should be liable only [illegible]
an Ingenuus the Heir [illegible]
singulares? Ans[illegible] Heir Male, without [illegible] he would be liable [illegible] certain Lands, he [illegible]

There being a Right made in favours of [illegible] visions of a great Estate; and in favours of another as Heir of Provision of an inconsiderable Extent: *Quæritur*, If the Person succeeding almost to all the Estate will be considered as Heir of [illegible] will be liable to relieve the other as Heir of Provision?

When there are Two Heirs of Taillie in diverse Lands, of which the Rent is not equal, but the one much disproportionable and less than the other: *Quæritur*, If they will be liable to the Debts equally, or proportionally?

S. It is here queried, *If there be no heritable Estate belonging to the Heir of Line, out of which the Executor may be relieved of heritable Debts, Will he get his Relief off the Heir of Taillie.* But since the Creditor might have pursued the Heir of Taillie for the Debt, after discussing of the Heir of Line, there appears no Reason why the Executor paying his Debt should not have his Relief against the Heir of Taillie. Of this the Author *doubts*, and says the Heir of Line, if the Executory be inviting, may confer, which the Heir of Taillie or Provision may not. But the Heir of Line is ordinarly the first in Blood, and therefore should never be refused to confer with the neareſt of Kin or Executors; but the Heir of Taillie must hold him with this Provision: And yet, seeing he is Heir *in suo ordine*, he ought to relieve the Executors of heritable Debts.

The same Question is stated betwixt an *ultimus hæres* and the Executors nominate of a *Bastard*. But the Executor being lawfully nominate, should still have his Relief of any Debt the *ultimus hæres* is liable to.

Hæreditas being *successio in universum jus*: *Quæritur*, Why an Heir of Taillie is called *Hæres*, seeing he succeeds in particular Lands, or a particular *fundus*! And 'tis thought the *Civil Law* would not confirm him to be an Heir, but rather a Legatar, or, Donatar *mortis causa*. The Author says he succeeds *in omne jus talliatum, & non singulare*; and as representing the Defunct *in ea re*: But these are all empty Words; for the *jus talliatum* is only the Lands taillied, and the Succession is as simple a Transmission thereof, as if it had been by Disposition. And the making him *represent the Defunct* is that complained of, there being *no* Reason for it, since he represents no further than every simple Donatar, in the Thing he succeeds in. 'Tis true, if a Man adventure to be Heir in general, tho' possibly there be little or nothing *in hæreditate*, yet it would make him universally liable to the Debt. But there he took his Hazard, and has himself to blame; whereas an Heir of Taillie did only intend what was specially provided to him. And therefore it may well be thought that an Heir of Taillie should be liable to Debts

ever

ever [illegible] tho' our Pratique differ.

If after [illegible] *certain Lands, the same by* [illegible] *Debt?* This Question [illegible] *feued there?* [illegible] what he was called to by Service of Taillie, but evicting of the Lands should free him of the Debts and of the *quasi contractus* entred into with the Creditors by his Ancestor.

Heirs of Provision and Taillie succeed manifestly *in rem singularem*, and 'tis incongruous to say, that they succeed *titulo universali*. And in Effect the *singularis* is a [illegible] and this the Author here says right, That one served Heir Male would be liable *in solidum*, but if served only Special Heir in certain Lands, he should be liable *secundum vires*, and no further. But this is rather Reason than our Pratique: For, we [illegible] and the Maxim, that wherever one is served Heir Special in Lands tailled, his Special Service includes a *general*, which is almost Nonsense in this Case.

Where a Right is made in favours of a Person as Heir of Provision in a great Estate, and another Right in Favours of another Person as Heir of Provision in a small Estate; Or, which appears to be the same, where there are Two Heirs of Taillie in Lands of an unequal Value; they will be liable *in suo ordine in solidum*, or *conjunctly and severally*, as our Pratique runs, tho' in Effect it ought only to be *secundum vires*.

When Heirs of Taillie may be considered as Creditors.

N. One having taillied his Estate by a Disposition to One and the Heirs of his Body, whilk failzieing, to other Substitutes; and by a Contract betwixt him and the Person to whom he disponed his Estate, he having taken the said Person obliged to do no Deed in Prejudice of the Taillie, but to preserve it inviolable: *Quæritur*, If he the Disponer should make a Disposition notwithstanding; may the Heirs of Taillie pursue Reduction of the same, as being made in Defraud of them, being Creditors by the said Contract?

If after the said Contract is registrate, the Heirs of Taillie have *jus quæsitum*: So that the Contracters cannot Discharge, or prejudge the same?

S. This is an odd Case, and scarce supposible. But if the Taillie was perfect, and the Granter should contraveen, the Heirs of Taillie it seems, may pursue a Reduction of that Deed. The Author further supposes the said Contract to be registrate; but 'tis thought that the Contracters may still with mutual Consent dissolve the Contract; and that the Registration signifies nothing as to any *jus quæsitum* to the Heirs of Taillie, more than by the Contract it self. But the Case is heteroclyt.

S. They [illegible] our following Times, *viz.* *Hæres* [illegible] *Latin* [illegible]

Ultimus Hæres.

N. IF a Donatar by a Gift of *Ultimus Hæres* will be liable to the Defunct's Debt personally, effeirand to the Estate? And if he be, what Course shall be taken to affect it?

IF such universal Disponees be liable *in solidum*, (If they be found to be liable personally) unless they give up an Inventar? And what shall be the Method of giving up an Inventar?

S. A Donatar by a Gift of *Ultimus Hæres* will be liable to the Defunct's Debts effeirand to the Estate, and must either give up Inventary and make the Estate forthcoming, or be liable *simpliciter*. And the Method of their giving up Inventary should be, by offering the same when pursued, and with Certification if they conceal, but still real Diligence may proceed against the Estate, whether they give up Inventary or not?

Heirship Moveable.

N. IF a Son that is Forisfamiliat, and has a Family, will get a moveable Heirship by his Father? *Ratio Dubitandi*, He is sufficiently instructed, and accommodated as *Pater Familias*: And *e contra*, the other Children, though Forisfamiliat will be Executors, and exclude him; and in that Case there is no Reason, that all should be Executors, and the Heir excluded.

S. A Son and apparent Heir, tho' Forisfamiliat, will yet have by his Father, the moveable Heirship; for *Forisfamiliation* signifies nothing in this Case. And suppose the other Children to be also forisfamiliate; yet they will be Executors as neareſt of Kin, and there appears no Reason that they should exclude him.

N. WHETHER a Coach and Cart will fall under Heirship with the Horses belonging thereto the Time of the Defunct's Decease? And whether not only the Plough, but Oxen or Horses that goes in the same, will belong to the Heir?

S. THIS Question must be determined by the Custom. But it would appear that if Coach, Cart, or Plough, be the *Best Aught* and Heirship, the Oxen and Horses necessary should go with the same as *Instrumenta fundi*.

N. An [illegible] ſtyled Heirſhip? *Ratio Dubitandi*, [illegible] *Familiæ Maritæ*, and has none of her own?

S. An Heireſs being *in Familia Maritæ*, which gives her only her Dead's Part, *that* ſeems to be all ſhe will fall to her of their Moveables in ſuch a Caſe, tho' ſhe be a Baroneſs; becauſe the *jus mariti* ſwallows up all until the Moveables come to this Diviſion. And it were hard he ſhould draw any thing out of this Part, tho' the Heir of the Husband, Baron, draws out of all.

N. Quæritur, If a Jewel may fall under Heirſhip, upon Pretence, that it is the Jewel of the Family? *Ratio Dubitandi*, Jewels are only *Focalia*; and Heirſhip is properly *Inſtrumenta fundi*, or *Domus*: And in *England* are called *Heir-looms*.

S. A Jewel, repute and kept as a Jewel of the Family, *'tis thought*, will fall under Heirſhip, by this Deſtination, and the Proprietars thereby ſignified.

Money conſigned for Redemption, whether Heritable or Moveable?

N. MONEY being conſigned upon an Order of Redemption: *Quæritur*, If after Decreet of Declarator the ſame be heritable or moveable? *Ratio Dubitandi*, That it belongs to the Creditor, and is moveable, and as it were in Caſh; which of it's own Nature is moveable: And on the other Part, *Surrogatum ſapit naturam ſurrogati*; and as the Relict would have a Terce, ſo the Heir, who only can renounce, ought to have Right.

S. It hath been already anſwered, Tit. *Heir and Executor*; That, before Declarator, Money conſigned upon an Order of Redemption is heritable *quoad* the Debitor in the Reverſion; but after Declarator it is moveable: Yet ſtill ſo, that the Wife Conjunct-Fiar in the Wadſet, muſt have her Liferent thereof upon Redemption as the Equivalent.

Sums Heritable or Moveable.

N. A Sum being due by Contract, whereby the Buyer of Lands is obliged to pay the Price; but ſo, that it is provided that it ſhould be retained for Payment of Annualrent, until an Infeftment of Warrandice upon the Lands be purged: *Quæritur*, Whether the ſaid Sum be heritable or moveable?

S. It is thought, That until the Infeftment be purged, the Seller's Executor cannot crave the Money; but ſtill it appears to belong to the Seller's Executor under the ſaid Condition: But how the Executor can compel the Heir to purge the Infeftment, is not ſo clear; ſo that this may occaſion the Sum to ly long enough. However there appears

no Reason why it should belong to the Seller's Heirs; for it cannot be said in this Case to be heritably secured, but only to be a Conditional Debt.

Homologation.

N. SIR *William Ker* having got a Right under the Great Seal to debatable Lands upon the Borders, wherein *Ker* of *Cherrytrees* pretended a Right and Intereſt and Property by a prior Gift, and *Bennet* of *Grubet*, an Intereſt of Commonty: The ſaid Sir *William Ker* and *Cherrytrees* did by a Minute oblige themſelves to communicate their Rights, ſo that Sir *William Ker* ſhould diſpone to *Cherrytrees* his Right as to his Part of the ſaid Lands *Cherrytrees* was in Poſſeſſion of; and that *Cherrytrees* and his Succeſſors ſhould be obliged not to queſtion Sir *William Ker* his Right: Thereafter *Cherrytrees* offered to aſſign the ſaid Minute to *Grubet*: *Quæritur*, Whether or not the accepting of the ſaid Aſſignation would import an Homologation of Sir *William Ker*'s Right, and a paſſing from *Grubet*'s Right? And if *Grubet* by the Obligement foreſaid, would be obliged not to queſtion Sir *William Ker*'s Right as to *Grubet*'s Part of the ſaid Commonty? ANSWER, That *actus agentium non operantur ultra eorum intentionem*; and *Grubet* did not intend to prejudge himſelf, but to better his Right and to be free of a Plea; and he could not queſtion Sir *William Ker*'s Right upon that which he was to have from *Cherrytrees*; but could not be barred to queſtion the ſame upon his own Right which he had not from *Cherrytrees*.

A Tailzie bearing a Clauſe irritant, That the Courſe of Succeſſion ſhould not be altered, and that the Contraveener ſhould loſe the Right; and the Heir of Tailzie in Minority having reſigned in Favours of other Heirs that were not contained in the Tailzie, and being infeft upon the ſaid Reſignation: *Quæritur*, If the ſaid Heir after Majority continues to poſſeſs and to adminiſter, and has granted Commiſſion for doing other Deeds concerning the Management of the Eſtate *intra quadriennium utile*, but before intenting of Reduction *ex capite Minoritatis*: Will he be thought ſo to homologate the ſaid Alteration, that he cannot queſtion the ſame, and cannot be reponed againſt the committing of the ſaid Clauſe irritant? ANSWER, It is thought, That the Poſſeſſion will not import Homologation, ſeeing it may be aſcribed to the former Right, which cannot be ſaid to be altogether extinct by the ſaid other Right; the ſame being null, at leaſt *annullandum* and reducible. *Vide Taillie altered, in Litera* T.

S. THE particular Caſe of Sir *William Ker*, *Ker* of *Cherrytrees*, and *Bennet* of *Grubet* touching ſome debatable Lands on the Borders, needs no *Remark*.

AN Heir of Taillie having contraveened by reſigning in Favour of himſelf and other Heirs, in his Minority; and being infeft thereon, continues to poſſeſs after his Minority: The Author thinks, That his Poſſeſſion is no ſuch Homologation as to hinder him to be reponed. But, if the Party were not very favourable, this *continuing to poſſeſs* by vertue of the ſaid new Reſignation, would be judged a Ratification thereof; and ſo a Contravention not retrievable by a Reduction *ex capite Minoritatis*.

Horning.

N. IF a Perſon charged may be denounced Year and Day after the Charge, without a new Intimation?

If a Pupil may be Charged and Denounced, and taken with Caption? *It is thought*, Not; ſeeing he can neither *Velle* nor *Nolle*, nor obey nor diſobey.

There is not *eadem ratio* as to Minors.

If it may be objected againſt a Judge that he is at the Horn; ſeeing Parties may be debared from pleading, as not having *Perſonam*: And there is the ſame Reaſon to debar Judges *a judicando*.

N. A Perſon charged with Horning, but not denounced within Year and Day, cannot be Denounced thereafter without a new Intimation: For ſuch Charges are judged Annual.

The Act 41 Parl. 1696, hath exempted Minors under Pupillarity from Caption or Warding for any Civil Cauſe.

Tho' a Judge be at the Horn, nay, tho' he were forfaulted, the Parties cannot object that againſt him, to decline him: Tho' for the ſame Cauſes they may debar One another, as not having *Perſonam*.

How far a Husband is liable for his Wife's Debt.

N. SEEING the Husband by his Marriage has Right *jure Mariti* to all moveable Eſtate belonging to his Wife; and acquires the ſame *per Univerſitatem*, as if ſhe had made an Aſſignation and Right in his Favours: *Quæritur*, Whether he will be liable to all her Debts, at leaſt Moveable; *quia penes quem commoda penes eundem incommoda?* At leaſt, If he will be liable *peculio tenus, in quantum locupletior factus eſt?*

If there be any Difference betwixt a Husband's getting a Tocher, and when there is no Tocher but *jus Mariti?* Seeing in the Firſt Caſe, he is a Creditor by Contract *ſingulari Titulo*: And in the other, he has Right *Titulo univerſali omnium bonorum*, which are underſtood *Debitis deductis*.

If a Husband may be liable for the Wife's Debt, the Marriage being diſſolved?

Item, If after the Marriage is diſſolved, any Debt come to his Knowledge, that did belong to his Wife during the Marriage: Whether he might purſue for the ſame?

How far the Husband will be concerned in his Wife's Debts, *Activè* or *Paſſivè?*

S. A *Husband* getting Right *jure mariti* to all *his Wife*'s moveable Eſtate is alſo judged liable to all her moveable Debts; *quia ſequuntur Univerſitatem*: And he is Adminiſtrator of the Communion; and therefore muſt be liable ſimply during the Marriage, without Reſpect to *quantum locupletior factus eſt*. But if the Marriage diſſolve by Death, her Part, that is, The Relict's Part, will only be liable for the ſame Debts. But this includes ſeveral Caſes, which are particularly ſet down in *Stair*'s Syſtem.

Whether the Wife Assigner Moveables in Tocher by this Contract; or that the *jus Mariti* by it self reaches the same, *pendente matrimonio*. For the Husband still gets her *quamprimum jus in Mobilibus*. And if he come to the Knowledge of any Debts or Goods that would have belonged to his Wife during the Marriage, tho' this happen after the Marriage is dissolved; he may yet pursue for the same: For the Marriage is construed to be a *legal* Assignation.

De Hypothecis, vulgo Wadsets.

N. " LICET tam instrumento alienationis quam Charta a Domino directo concessa terræ ipsæ alienentur, Jus proprietatis nonnun-
" quam haud transit; sed inferius, Hypothecæ forte ceu impignoratio-
" nis: Cum enim juxta regulam *plus cautionis sit in re quam persona*,
" aliquando prædia a debitore alienantur in majorem cautionem & secu-
" ritatem ut loquimur. Hypotheca autem terrarum alia apud nos im-
" propria dicitur, alia propria, nec minus ista, hæc magis propriè est
" impignoralis. Pignus siquidem & hypotheca proprie datur, ut Credi-
" tori caveatur, non vero ut utatur nisi die solutionis adveniente, debi-
" tor in mora aut non solvendo sit: impropria vero Invadiatio ea dici-
" tur, cum creditor prædii jus & investituram nanciscitur ut sibi tam de
" sorte quam usuris cautum sit, sed ea Lege ut prædii possessio penes
" debitorem remaneat, non jure proprietatis qua prorsus exuitur, sed
" conductionis: id fit pacto in Instrumento alienationis inserto, quo Cre-
" ditor qui per alienationem Dominus & vasallus est, prædium ut suum
" relocat debitori, stipulatis annuam mercedem quæ solennes & licitas
" pecuniæ usuras haud excedit; addito etiam pacto de reversione seu
" retractu, seu redimendo, quando aut debitor aut creditor voluerit;
" aut prout convenit inter contrahentes: Hypotheca quæ propria dici-
" tur ea est, quando *sciz.* prædium non tantum in Cautionem sed
" alienatur; & tam terræ quam pecunia quasi functionem recipiunt;
" ita ut pecuniæ usus quæcunque sit ad Debitorem; prædii vero usus
" & possessio etiam naturalis ad Creditorem pertineat; sed sub modo &
" pacto de retrovendendo: Ex his varia nec levia emergunt Dubia.

" Inter ea est illud, si ex delicto Creditoris qui ex Investitura vasal-
" lus est, feudum ad Dominum Superiorem redierit; terris forte (si præ-
" dium militare sit) ultra modum licitum & semissem alienatis, aut alio
" delicto feudali, vel ex crimine læsæ majestatis: An Dominus illud ha-
" beat ut optimum maximum, & quale ab initio charta originali ab eo
" aut ejus Decessoribus aut Authoribus profectum fuerat: vel tantum ut
" Hypothecatum aut Impignoratum, & Retractui & Juri reluendi ob-
" noxium.

" Plerisque (ut arbitror) videtur Creditorem mulctandum jure
" suo tantum, salvo debitori ejus culpæ haud affini jure suo & Retra-
" ctu, cui Dominus Superior consenserat pacto isto de redimendo inipsa
" charta inserto: & pro hac sententia stare videntur trita illa Juris Axio-
" mata; *Noxam capnt sequi, Nec ullum facto suo sive ex facto sive ex*
" *delicto, plus juris in alium transferre posse quam ipse habet.*

" Veruntamen acriore & fixo obtuitu penetrantibus & ut par est
" omnibus rationum momentis ultra citraque scrutinatis, Jurisconsultis
" adversa ut opinor placebit sententia, earum (quæ sequuntur) rationum
" suffragio subnixa, siquidem illud quod agitur magis inspici quam quod
" concipitur, & actus agentium ultra eorum intentionem haud operantur.

" quic-

" prior, Dominium [illegible] ex Recognitione ob alienā-
" tionem aut quovis [illegible] Prædium domino commissum, ad
" Dominum remaneat quale ab initio fuerat, aut rediturum fuisset, si
" prior vassallus deliquisset. Nec præsumendum Dominum, pro laudemio
" quod in Hypothecis si non minus haud majus esse solet eo, quod pro
" alienatione simplice dependitur, Dominium suum ejusque fructus velle
" carpere aut imminuere.

" Accedit, quod pacta ista inter Debitorem & Creditorem, quoad
" Dominum sunt extrinsica; nec ejus jus aut Dominium directum sed
" vassalli & Dominium utile afficiunt: Quamdiu igitur Creditoris Jus &
" Dominium utile adhuc durat, pactis istis subjacet; eo autem sublato &
" amisso, pacta ista, quæ ei inhærent & accessoria sunt, cum principali
" evanescunt.

" Adhæc; feudo ex delicto Creditoris qui vassallus est Domino
" commisso aut ob Perduellionem amisso; vel prædium ad Dominum
" pertinebit, quale fuerat ante Hypothecam, aut jus tantum Hypothecæ:
" Dici autem nequit Hypothecam Domino committi, ea enim est cautio
" in rem pro pecunia, & inanis & accidens esset sine subjecto, si Dom-
" ni esset sine pecunia, quæ, ut nunquam ejus fuit, ita demum redire
" nequit.

" Nec obstat illud, *Nemidem plus juris in alium transferre quam ipse*
" *habet*; multis enim casibus Jus quod vassalli fuerat, sed facto suo im-
" minutum, & vel servitutibus, vel Juri Retractus ab eo concesso ob-
" noxium, plenius ad Dominum redeat, feudo ex delicto commisso.

" Nec magis officit, quod Dominus pactis istis videtur consensisse;
" ea enim non inter Dominum & Debitorem & Creditorem inita sunt,
" sed a contrahentibus ipsis apposita & chartæ inserta ne personalia di-
" videantur; & ut afficiant vassalli jus ad quoscunque ejus successores
" perveniat; non vero ut imminuant aut lædant jus Domini directi; id
" ex ipso pacto de reversione ejusque verbis elucescit; eo enim cave-
" tur prædium per Debitorem ejusque hæredes & assignatos redimi &
" relui posse, sed a Creditore ejusque hæredibus & assignatis in jus cre-
" ditoris succedentibus; Dominio autem utili ex delicto caduco & ex-
" tincto nullum jus supereſt creditori, in quod ejus hæredes aut assignati
" succedant; quodque ab iis redimi & retrahi possit; nec Dominus,
" vassallo ob delictum dominio utili privato, in id creditori succedit:
" Jus enim suum ex delicto amittit quidem, non autem transmittit nec
" amissum transferre potest: utque unaquæque res ad naturam suam fa-
" cile redit; ita plena proprietas, quæ ante concessionem vassallo aut iis
" a quibus causam habet, domini fuerat, eorum jure extincto ad domini-
" um redit & revivisci.

" Porro, si ex delicto Creditoris, qui solus in feudo & vassallus est,
" non committatur feudum ipsum quale a domino profectum fuerat;
" sequitur illud tum incommodum tum absurdum, Latifundia *sciz.* &
" Baronias quæ pro modicis pecuniarum summis in cautionem & Hypo-
" thecam impropriam dari solent, spreto domino, impune alienari posse;
" debitore penes quem est jus reversionis illud cedente; ex ejus enim
" facto & alienatione nihil domino obvenit aut committitur, in quem
" nihil commisit aut deliquit jure suo usus, cum in feudo & sasina haud
" sit nec ulla inter eum & dominum necessitudo & obligatio interve-
" niat, quæ alienationem impediat.

" dem quo alii [illegible]
" diversis fidem & conditionem [illegible]
" adversus eum pro damno [illegible]
" Si hæc sententia durior videatur, facile erit eum
" pacto de retrahendo, ita ut diserte caveatur prædium
" tore ejusve successoribus, sed & a Domino si ad eum
" delicto creditoris, retrahendum; pecunia credita et pertinax
" mino scienti & volenti nec fraus nec injuria fiet.

S. In this *Latin* Discourse of Wadsets, the Author handles the Question, If a proper Wadset being granted to be holden of the Superior, the Wadsetter becomes so Vassal, as that if he be Year and Day at the Horn, and his Liferent Escheat so vaik; or if he alienate the greater Part of the Few, or any other Casuality fall by him, the Superior should have the same without respect to the Vassal's limited Interest by the Reversion to the Debitor, tho' incorporate in the Superior's Charter? And resolves the Question *positively*, there being no Remedy for it, unless the Granter of the Wadset provide at the same Time by a Regress from the Superior against these Inconveniencies. And yet it may be thought, That the Superior consenting in a Manner to the Reversion, the Wadset Lands, upon an Order of Redemption used, should return to the Debitor *free* of these Casualities happening to the Superior, and that all that the Superior could crave by the Wadsetter's Liferent Escheat should be, the Liferent of the Money: And that as to Recognition it scarce appears to be here casible where the Wadsetter hath only a Right limited by the Reversion. But the Author argues from the strict Rules of the *Feudal Law*, which yet *Equity* founded on the Superior's Consent, should here in all Reason mitigate.

Tacite Hypotheck.

N. QUÆRITUR, If a Tacite Hypotheck being not only of *Fructus*, but *Instrumenta Fundi*: *Quid Juris* in Grass-Rooms, where there is nothing payed but Silver?

S. This Question is not clearly stated; but if it meaned that the *Hypotheck* is not only of the *Fundus*, but of the *Instrumenta Fundi*, it may be thought, That in a Grass Room, the Stocking upon it as well as the Lands should be hypothecate.

N. What is the Effect of a Tacite Hypotheck? And if a Tenent should sell his Corn in a Mercat, may not the Master pursue *Actione Hypothecaria* against the Buyers, who should know the Condition of these with whom they deal?

S. The Effect of a *Tacite Hypotheck*, if it be understood of the Masters Hypotheck in the Fruits of the Ground for a Year's Rent, is well known to be very strict for the Year's Rent against all intrometters with that Cropt: Yet 'tis thought, what the Tenent exposes and sells in publick Mercat should be liable to no Back-Call by the Master, and that *propter favorem Commercii & fidem fori publici.*

The

N. The Lessee of Lands or Master having a Tacite Hypotheck for a Year's Duty *Quæritur*, If the said Hypotheck be alse well for the Stocking upon the Ground, as of the Growth and Increase?

S. The Master's Tacite Hypotheck for a Year's Duty is as well of the Stocking as of the Growth and Increase, for *both* are in this Case understood to be hypothecate.

N. Quæritur, If the Rests of diverse Years amount only to a Year's Duty; Whether the Master will have any Hypotheck as to a Year's Duty so made up? Or if it be understood only of the Rests of the immediately precceding Year?

S. If the Master should suffer the Rests of diverse Years to ly over unpayed, tho' they may only amount to one Year's Duty, yet no *Hypotheck* for the same, but only for the present Year's Rent.

I.

Immobilia.

S. THIS and the following Title *Immobilia per applicationem & aliis modis*, are only *Latin* Citations.

Imposition upon the Pint of Ale.

N. Quæritur, IF the Gift of the Town of *Edinburgh* and other Burghs, of *Two Pennies* upon the Pint of Ale, or *Two Merks* upon the Boll of Malt, may be questioned by any concerned, upon that Ground, That being a Burden upon the People it could not be laid upon them, without Consent of Parliament? ANSWER, It is thought, it may be questioned. 1. For the Reason foresaid, being the Fundamental of the Liberty of the People. 2. The whole Country is concerned, and has Prejudice thereby; in respect that they who dwell within the *Lothians* will suffer as to the Price of their Bear; which will be less in consideration of the said Burden of *Two Merks* upon each Boll; and consequently the whole Country will be prejudged; the Price of the Bear in *Lothian* being the Standard almost of the whole Country; *Edinburgh* being *communis Patria*; and the Drink upon that Occasion being both worse and dearer. And the Shires of *Lothian* having concurred, they came in End to a Condescendence, That the *Town* should be obliged never to desire the like. And 'tis thought, That the Gift, both in passing at the Exchequer, and Ratification thereof in Parliament, was so qualified. 4. A Bond was given by the *Town* to that Purpose to the *College of Justice*, and also to the *Shires*; and both were trusted to One of the Commissioners of the Shires to be kept; and 'tis informed, was given back by him *viis & modis*. 5. The Pretence of Debts, and Alteration of the Way of living of the Magistrates is frivolous; Seeing the

Town ought not to contract Debts, the Magistrates [illegible] *Currentes*: And the King could not lay a Burden upon the [illegible] Payment of his own Debts: And the Debt of the *Town* is no [illegible] it was formerly before the First Gift: And the Magistrates should not [illegible] upon what is given to the *Town*. 6. As to the Pretence of [illegible] ty's Prerogative; it is against Law, and the common Stile of the [illegible] cery, which should not be altered: And His Majesty doth make use of his Prerogative to remit the Rigour of Law, but not to give ille[illegible] Grants *rei alienæ*, to prejudge and burden others: And therefore such Grants are ever understood *salvo Jure*, and to be *periculo petentis*. 7. The dispensing with the former Bond is of dangerous Consequence; His Majesty's Prerogative being never against Justice; and for taking away the Bonds and Rights granted to the People, without their own Consent: Otherwise there should be no Security for Liberty and Property.

S. The Author reasons justly against these Impositions by Royal Gift, And the Claim of Right 1689, hath carried the Matter farther, *That the giving Gifts or Grants for raising of Money, without Consent of Parliament or Convention of Estates, is contrary to Law.* And this has been extended even against Conventional Agreements within Burgh, wherein the whole Community agreed, and took upon themselves voluntarily *Two Pennies* or a *Plack* on the Pint, towards defraying of the Town's Burdens. And these were also reprobate.

Impositions of Burdens upon Shires.

N. SEING Shires are not Incorporations: *Quæritur*, If upon any Pretext whatsoever the major Part may lay any Burden upon the Shire, or any Part of it without their Consent?

S. Neither the *major Part*, nor even the *Whole* of the Shire may impose any Burden either upon the Heritors or Inhabitants: For this can only be done by Law, and not by common Consent without Law.

Impositions Voluntary upon Shires.

N. WHen any Charges for Banner, Trumpet or Coat, *&c.* for the Heritors, are to be payed: *Quæritur*, Whether the same are to be payed *viritim & per capita*; or, proportionally according to the Valuation? Answer, They are Personal, and not Patrimonial: And are to be payed with respect to the Persons, and not their Estates.

S. The Charges for Banners, Trumpets, Coats, *&c.* to the *Militia*, can only be imposed by Warrant of Law: And as hitherto imposed, appears to be the Burden of *Heritors* according to their Valuation, and not of the Inhabitants *viritim*.

Improbations.

N. IF Pursuers of Improbations should Consign? Of late, some are of Opinion, That Consignation is to be made only when Improbation is proponed by way of Exception. But the Act of Parliament [illegible]

ent Cause, [illegible] which Consignation is come, is clear as to [illegible] Action or Exception.

It appears there should be a difference betwixt a general Improbation, at the Instance of Heritors and Buyers, which is a Negative used to try the Condition of the Lands, if they be affected with any latent Pretences: And the Case of special Improbations, and Improbations of certain Writs; and that in this Case there should be Consignation, but not in the other; unless upon Production a particular Right be taken to be improven.

When in Improbation Writs are produced, and Certification craved *contra non producta*; and it is alledged that the Defender has produced sufficiently to exclude the Pursuer: *Quæritur*, If notwithstanding Certification should be granted? Answer, By the late Pratique, the *Lords* are in use to hear the Parties debate upon the Right: Which is thought hard, seeing if the Defender be confident of the Right, he has no Prejudice by granting the Certification; and having gotten long Terms, he ought to produce all Writs called for: Seeing Improbation *est processus tentativus*, and in order to try the Defender's Pretence, and not to debate a Right.

S. When Improbation is proponed by way of *Exception*, the Excipient is always ordered to *Consign*. But the said Act of Parliament includes all Improbations by way of Action or Exception. *See the Act* Q. M. *Parl. 7. Cap.* 62. And the Author doth well distinguish betwixt *General* Improbations raised for Production and Discovery, and *Special* Improbations of certain Writs: And in this Case only allows Consignation; unless after Production, a particular Right be taken to be improven.

In Actions of Improbation, when Certification is craved *contra non producta*, the Defender sometimes alledges, That he has produced sufficiently to exclude the Pursuer. And the Author is not satisfied that the Lords should allow this Plea; but that rather Certification should go out upon the Defender's Hazard. And indeed when this Alledgeance is made and sustained, if the Defender succumb, it seems, Certification should go out against him, without allowing him a farther Term.

Impugning the Authority of Parliament.

N. By an express Act of Parliament, The Impugning the Authority of the Parliament consisting of Three Estates, is Treason. *Quæritur*, If the Misconstruing or Impugning the Proceedings of the Parliament, if they amount to Treason? Answer, There is a Difference betwixt Impugning Authority, and Proceedings of Judicatories; seeing Judges may have an unquestionable Authority, and yet their Proceedings may be questioned. And Papists and Hereticks cannot controvert the Authority of Parliament, and yet may be dissatisfied with, and misconstrue the Proceedings of the same. Which Practice, tho' Criminal, doth not amount to Treason.

S. Impugning the *Dignity* or *Authority* of the Parliament, or any of the Three Estates, is Treason by the Act *Jam.* 6. Parl. 8. Cap. 130. And the Author says well that Impugning the *Proceedings* of Parliament is another Case. But there is also another Act *Jam.* 6. Parl. 10. Cap. 10. making the *Depraving* of Laws or Acts of Parliament, to be Death.

But the Rigour of this Act, as to the Point of Prescription, is well corrected by the Act of several other Acts of the like Nature, as is well corrected by the Act Parl. 1. Q. *Anne*.

Incorporations.

N. IF a College or Corporation, being in Law, a Body, may forfault the Rights of the Corporation, and in what Case? *Ratio Dubitandi*, Magistrates are only Curators, *loco curatorum*; and the University never dieth: And Bishops, and such other sole Corporations, tho' they commit Barratry, do not forfault in Prejudice of their Successors.

When a Town or Incorporation that has Power to contract Debts, do grant Bond obliging the Magistrates and their Successors, and bearing Horning and other Executorials: *Queritur*, If succeeding Magistrates may be charged with Horning? And if they be Denounced, Will the Escheat of their Moveables fall, or only of Moveables belonging to the Town? *Ratio Dubitandi, Officium nulli debet esse damnosum*; and they are not bound themselves personally, but only they and their Successors *in officio* in Behalf of the Corporation: And on the other Part, if they should not be liable, the Execution would be elusory: And tho' it is not just that they should pay such Debts out of their own Estate; yet they are liable to pay the same out of the Estate of the Corporation: And if they cannot raise so much for the Time, out of that Estate, they should Suspend, and make it appear that they are neither *in mora* nor *in culpa*.

Quid Juris, As to Compriſing or Adjudication as to such Bonds? Whether it should be only of the Publick Estate, or of the present Magistrates likewise; specially after the Letters are found orderly proceeded upon a Suspension discust against them?

After the Magistrates are Denounced, and Year and Day at the Horn, *Quid Juris*, as to the Liferent-Escheat? Whether will that of the Town fall? And, How long their Liferent shall be thought to endure? Or, If the Liferent of the Magistrates, and each of them will fall?

If the succeeding Magistrates may be Charged summarly? And, if they be denounced, Will their own Escheat fall?

S. Tho' the Malversations of Magistrates may, in several Cases, only affect themselves; yet even Incorporations acting without, and against the Warrant of their Charters, or falling in any treasonable Practice, may, and do thereby forfeit their Rights.

A Town or Incorporation, may contract Debts; and Bonds given by the Magistrates and Town Council for the Time, do bind them, and their Successors in Office; so that they may be summarly charged, but their own private Estates will neither be poindable, nor otherwise liable; and yet their Persons will be liable to Caption, if they do not suspend and make it appear, that they are neither *in Mora* nor *in Culpa*: But that the Deficiency is in the Town's Funds, which they are ready to make forthcoming: And if such a Suspension should discuss against them; yet Adjudication should only proceed, *as poinding*, of the Town's publick Good, and not of the Magistrates private Estates: But if they do not suspend, their Persons would be still liable as said is, and their Escheat also in Hazard, if they be guilty of Contempt.

And tho' the Magistrates for the Time, and Others in Office, should happen to be denounced, and ly Year and Day at the Horn; yet there could be no Liferent Escheat as to the Burgh, because

because it does not [illegible] the Lieges Exciseable of the Magistrates not suspending, may be questioned; since they ought to have purged their Contempt by suspending, even as Tutors are obliged to do. But it would not hold.

There is no Question, but that upon Bonds granted by Burghs or Incorporations, their Successors in Office may be charged summarly.

Infeftment of Annualrent.

N. LANDS being affected with Two Annualrents to diverse Persons, and being comprised for the By-gones of the First; *Queritur*, If after the Expiring of the Comprising, the Comprifer (the Lands being sufficient to pay both Annualrents) will be liable to the Second Annualrenter? Seeing the Lands were affected therewith the Time of the Comprising: And though the First Annualrent was Prior, the Debitor did no Prejudice to give the Second; the Lands (as said is) being able to pay both.

If the Second Annualrenter may redeem?

S. Tho' the Lands were affected with the Second Annualrent the Time of the Comprising for the By-gones of the First; yet this Comprising is drawn back; so that the Second Annualrenter must redeem, or is in hazard to be cut off.

Base Infeftment.

N. LAND, holding Feu, being disponed to be holden either of the Disponer or of the King; and the Disponer being obliged to infeft by Two Infeftments, the One to be holden of himself Blensh, and the other of the Superior as the Disponer held: *Queritur*, If the Buyer think fit to hold of the Disponer, and does not make use of the Procuratory; Whether during the Time that he continues to hold of the Disponer, will he be liable to relieve him of the Feu-duty?

S. While the Purchaser holds of the Disponer, he cannot be personally bound to relieve him of the Feu-duty; but the Superior hath still the Lands liable for his Feu.

Infeftment in a Right, both of Property and Annualrent.

N. A SUM of Money being lent, and thereafter (for further Security) the Debitor having granted a Disposition, whereby he is obliged to infeft the Creditor in an Annualrent out of certain Lands; and likewise to infeft him in the Property of the Lands (being extended to a Twenty Pound Land) for Security both of the principal Sum and Annualrent; so that he might have Recourse both to the Lands and Possession of the same; until he be satisfied, both of the principal Sum and by-gone Annualrents: And that by Two Infeftments under Reversion;

granted by a Charter, and Sasine following thereupon, being a Non-entry of the Superior, [illegible] tour-Duty of the Lands, or the Annualrent of the Sum hundred Pounds Sterling yearly) will fall and belong to Seiling the Annualrent *valet ſeipſum*. It is answered. That the Right being *inſtar Hermaphroditi*, and neither properly a Right of Annualrent nor Property, and yet both: It is thought, that in Law (as a Hermaphrodite is repute to be *ſexus prævalentis*) ſo in this Case *Jus Proprietatis trahit ad ſe Jus inferius*: And it being the Deſign of the Creditor, to ſecure both the principal Sum and Annualrent, and that the Debitor ſhould continue in Poſſeſſion (and in Wadſets improper where the Debitor is to poſſeſs either upon a Back-tack, or otherwiſe the Annualrent is not *Debitum fundi*) It is therefore intended that there ſhould be a Right of Property; but ſo that the Annualrent ſhould be ſecured in manner foreſaid: As if in a Right of Wadſet with a Back-tack, it ſhould be alſo provided, that the Back-tack Duty ſhould be *Debitum fundi*, and that it ſhould be lawful to the Creditor to poind the Ground for the ſame, as if it were ſecured by an Infeftment of Annualrent.

S. This Caſe is very *Heterocly*; but the Creditor falling in Nonentry, the Nonentry will be reckoned as of the *Property* and not an Annualrent, which of old *valebat ſeipſum*: But now this is rectified by the Act 42, *Par.* 90; whereby it is ſtatute, That heretable Annualrents be retoured only to the Blenſh, or other Duty contained in the Infeftment of Annualrent, until Citation in the Declarator.

Infeftment for the Uſe and Behoof of another.

N. IF a Right be granted to the Uſe and Behoof of another, will the Right Forefault by the Treaſon of the Vaſſal, in Prejudice of him to whoſe Uſe it is? *De quo vid. Wadſet Heretable or Moveable, Let, V. q.* 4.

And farther, If the Vaſſal be Year and Day at the Horn, whether will his Liferent fall in Prejudice of the *Uſuarius?* And if the *Uſuarius* be Year and Day at the Horn, whether will his Liferent fall to the Superior or not? *Ratio Dubitandi*, That *Uſuarius* is not Vaſſal, and yet has real Intereſt out of the Lands holden of the Superior.

S. The Truſtee in this Caſe is certainly Vaſſal, and the Superior regards him only as ſuch, if the Infeftment be neatly in his Favours.

But if the *Uſuarius* were Year and Day at the Horn, *It is thought*, the Donatar to his Liferent might compel the Truſtee to denude, as the *Uſuarius* might do; and ſo in the Caſe of his committing Treaſon.

Conditional Infeftments.

N. A MOTHER, being debarr'd from her Jointure many Years upon Occaſion of Incumbrances, and upon that Ground being *Creditrix* to her Son for a conſiderable Sum of Money; and likewiſe out

out of Reſpect to her Son having taken a Right to Compriſing for certain great Sums, did aſſign to her Son (being the only Son of her Marriage with his Father) both the ſaids Intereſts, to himſelf and the Heirs of his Body, whilk Failzieing to her ſelf and her Heirs; with a Proviſion that he ſhould not have Power to alter the ſaid Deſtination; and if he ſhould alter the ſame, the Aſſignation ſhould be void: But the Son having made no Uſe of the ſaid Compriſing, and there being no Infeftment thereupon, is Infeft in the Eſtate as Heir to his Father, *Quæritur*, What way his Mother and her Heirs may be ſecured, ſo that the ſaid Proviſion may be effectual to them, in caſe the Condition exiſt by the Failzieure of the Heirs of his Body? *Anſwer*. It is thought that the Son ſhould give her Bond, making Mention of the Mother's Favour to him, and of the ſaid Subſtitution and Proviſion, and that it is juſt it ſhould be made effectual to her in the Caſe foreſaid, if it ſhould fall out; and that by the Aſſignation her Right is liquidate in the Caſe foreſaid to 40000 Merks, to be paid to her and her foreſaids: Therefore, without Prejudice of the ſaid Aſſignation and Proviſion, he ſhould be obliged and his other Heirs ſucceeding to him in his Eſtate, Failzieing Heirs of his Body, to pay to her and her Heirs the Sum foreſaid, at the firſt Term of *Whitſunday* or *Martinmaſs*, after the Exiſtence of the ſaid Condition, and the Failzie of the Heirs of his Body: And for her better Security he is to be obliged to infeft her, and her Foreſaids in an Annualrent effeirand to the ſaid Sum out of his Eſtate, beginning the firſt Term's Payment, at the Term of *Whitſunday* or *Martinmaſs* after the Failzie of Heirs of his Body in Caſe they fail; with this Proviſion, that in reſpect the ſaid Infeftment is not to be effectual, but in the Caſe foreſaid, it ſhall not be prejudged nor queſtioned upon Pretence of any Length or Lapſe of Time or Preſcription: And that the ſame ſhall not commence nor beging to run, until the ſaid Right become effectual in the Caſe foreſaid.

S. The Author propoſes here a Caſe betwixt a Mother and her Son, with his Advice to the Parties agreeing, which is obvious enough: But if the Son ſhould not accept his Mother's Bargain, and ſo not be liable to the Condition, ſhe muſt certainly be in her own Place, and may make Uſe both of her Jointure Right and of her purchaſed Compriſing.

Publick Infeftments.

N. IF an Annualrent to be holden of the Diſponer, be confirmed by the King: *Quæritur*, If that Confirmation will make it publick?

If an Annualrent be diſponed out of diverſe Lands to be holden of the Granter; and a Decreet of poinding of the Ground be got as to ſome of the Lands, will it make the Right publick as to others?

S. Tho' an Annualrent to be holden of the Diſponer, be confirmed by the King, *That* will not make it publick. But this is ſo obvious that certainly the Author muſt have another meaning, *viz.* Whither this Confirmation will make it a valid Right, as if either publick by Infeftment, or clad with Poſſeſſion? And I think it ſhould, for the King's Confirmation ſhould make it ceaſe from being clandeſtine.

If an Annualrent be diſponed out of diverſe Lands, a Decreet of poinding the Ground, as to ſome of the Lands, or Part of them, will

make the Right publick to all, for even personal Payment at the rent, should clothe the Right with Publication.

Inhibition.

N. INHIBITIONS upon Bonds or Contracts, if they import only That nothing should be done in Prejudice of the same, and Execution thereupon? So that the Person having reduced upon the Inhibition, cannot make use of the same to sustain any Right, but such as depend upon the Ground of the Inhibition?

S. Inhibition upon a Bond or Contract, imports no more than that nothing be done in Prejudice of the same, and Execution thereon; so that a Person having reduced upon Inhibition can only make use of it to sustain his Right flowing from the Bond or Contract.

N. Both the Person Inhibited, and the Person Receiver of a Right, being out of the Country the Time of the Inhibition. *Quæritur*, If the Right be liable to Reduction? *Ratio Dubitandi*, Both the Inhibited and the Party-Receiver should be certiorated, and put *in mala Fide*: And as the Person Inhibited is not certiorate, if he be out of the Countrey, if the Inhibition be not execute at the Peer and Shoar of *Leith*, so there is *eadem Ratio* as to the Lieges.

S. No doubt, an Execution at Market-Cross of *Edinburgh*, and Peer and Shoar of *Lieth* is sufficient against the Person inhibited: And tis thought, the like Execution should serve also to certiorate all the Lieges abroad; but the Execution *where the Lands ly*, and the *Registration*, are the best Certiorations to all concerned.

N. An Order being used upon a conventional Reversion or legal, against a Person inhibited: Will the Inhibition affect the Renounciation granted by him; seing he may be forced to give it, and has Dependence upon a Right before the Inhibition?

S. The Lords of Session have cleared this Question by an Act of Sederunt, that the Inhibition will still affect, *See the Act.*

N. If an Inhibition being execute against the Debitor only, and being *in Cursu* only as to the inhibiting the Leiges, where the Lands lye, being at a great Distance; and Intimation in the mean time to the Party who is about to bargain with the Debitor; will put the said Party *in mala Fide*; so that there may be a Ground of Reduction, *ex capite Inhibitionis* against the Party inhibited, and that the said Right is fraudfully made and accepted, without a necessary Cause, in defraud of the Creditor, and after Intimation of his Diligence?

S. The Purchaser aprears to be in *bona Fide*, if he purchased *before* the Inhibition was execute at the Market-Cross where the Lands ly; but if *after*, tho' before Registration there being fourty Days allowed for that, he will be found *in mala Fide*: And if there was only a personal Intimation by way of Instrument made to the Purchaser, there is a stronger Certioration than that at the Market-Cross where the Lands ly:

And it may be enquired what was the Effect of Inhibitions of old before the late *Publications* at the Market-Croſſes, and the Regiſtration was appointed; for certainly the Purchaſer follows the Faith and Condition of the Seller, and if he was lawfully inhibited, and nothing omitted, the Inhibiter ſhould have the Benefit of his Diligence.

N. A whole Barony of Land being affected with an Inhibition, and being thereafter diſponed in ſeveral Parcels to diverſe Perſons: If one of the ſaid Purchaſers ſhould be diſtreſſed by a Reduction *ex Capite Inhibitionis* may he have Recourſe againſt the others for their proportional Parts, for his Relief, they being *in rem correi debendi*? *Vide Annuitrent, Quæſt. prima.*

S. One of theſe Purchaſers being *diſtreſſed* upon the Inhibition, ſhould not have Recourſe againſt the other Parcels of the Barony, tho' equally affected with the ſaid Inhibition; albeit, this would hold in the Caſe of an *Annualrent*: And the Diſparity is, That the Purchaſer againſt an Inhibition is *in Culpa*, and hath himſelf to blame; which cannot be ſaid in the Caſe of an Annualrent. But here the Purchaſer hath alſo a Remedy; for he may pay the Debt, and ſo get Right to the Inhibition; and then all the Purchaſers muſt draw with him.

N. If after an Inhibition is Regiſtrate, and Forty Days are paſt; If the Creditor getting Notice that his Debitor has Lands within other Shires, may inhibite the Leiges there, and Regiſtrate within Forty Days? And, If in that Caſe the Debitor muſt be again certiorate?

S. It may be thought, That Inhibitions can be execute at any Time as to Lands where diſcovered, and then Regiſtered; and that this Regiſtration, tho' not within the Forty Days of the Firſt Publication made in another Shire, ſhould ſtill put *in mala fide*, without a new Certioration to the Debitor himſelf; the Firſt Execution againſt him being ſtill good and ſtanding. But certainly a new Certioration appears the ſafer Way.

The Act of Parliament appointing Inhibitions and Interdictions to be Regiſtrate, ordains the ſame to be done within Forty Days after their Publication and Execution; Firſt in the Books of the Shire where the Party dwells; and if he have Lands in other Shires, in the Books of that Shire alſo. But it hath been queſtioned, If the Publication and Execution ſhould alſo be at the Mercat-Croſs of that other Shire. And, in my Opinion, wherever the Regiſtration is appointed to be, the Execution and Publication ſhould precede. Yet, where a Debitor dwelling in *Leith* was there inhibit, and at the Mercat-Croſs of *Edinburgh*; the Lords found the Inhibition valid as to the Lands in the *Canongate*, becauſe duly regiſtered in the Regality-Books, altho' not execute at the Mercat-Croſs of the Regality.

N. By a Minute, an Eſtate much incumbred being diſponed; and the Price being agreed upon at a certain Rate *per* Chalder, or 100 Merks; But ſo that the Incumbrances ſhould be purged by the Price *pro tanto*, and any Eaſe by the Creditors ſhould redound to the Seller; and the whole Incumbrances being purged, the Buyer ſhould count for the Superplus of the free Money, and ſhould pay beſide, 20000 Merks, after all is purged. *Quæritur*, Whether the Benefit of the ſaid Contract can be affected with an Inhibition, or with Arreſtment, at the Inſtance of Creditors of the Diſponer? *Ratio Dubitandi*; The ſaid Benefit is not liquid.

i.e. if the Creditors had Inhibit before, it would certainly affect a Contract more effectually than an Arrestment; but the Author should also hold if the Creditors had done no other Diligence, and as to all the superplus Price that could fall due.

N. If Inhibition does affect Lands acquired after Inhibition? *Answer Affirmative,* The Debitor not being discharged to dispone the Lands he has presently, but simply his Lands and Estate.

If at least it affecteth such Lands as are acquired, within the Shire where the Inhibition has been used?

S. It is thought Inhibition does affect Lands acquired by the Debitor after Inhibition; but then the Inhibition must be execute and registrat, where those Lands ly. And if the Lands acquired after Inhibition be within the same Shire where the Inhibition has been already used, it appears to be sufficient tho' they had been acquired even after forty Days and the Registration in that Time.

N. Quæritur, If Inhibition doth affect Bonds tho' Moveable by the Act of Parliament, so that the Creditor cannot Assign the same?

Quæritur, If Inhibitions doth affect Bonds, so that the Creditor cannot thereafter Assign the same? *Ratio Dubitandi,* That it is thought, they affect only real Estates and Interests; and there is no Mention of Bonds and Debts which are Personal; and they come not under the *General* of *Goods and Gear,* which are real Things: Whereas Debts are *Nomina,* and *Entia Juris & Rationis.*

S. It is thought, That Inhibition doth not affect Bonds moveable by the Act of Parliament, tho' they were Heritable of before; seeing the Sum might have been arrested. But the Author, who puts few Questions without a good Reason, points at this, If the Inhibition, tho' it do not affect the Debt and Debitor; yet doth it not disable the Creditor that he cannot Assign: So that if the Assigny and Inhibiter were competing, the prior Inhibition might be thought preferable, so long as the Debt is unpayed. But the Author thinks Inhibition a Remedy in Law, to affect only real Estates and Interests, and neither *Nomina* nor moveable Goods and Gear.

N. If Inhibitions affect Lands acquired thereafter? The *Ratio Dubitandi* is, No Diligence can affect *non Ens,* and what did not belong to the Debitor: And if Inhibition will not affect Lands when it is not execute at the Market-Cross where they ly much less can it affect Lands that has not *Situm* as to the Debitor, and does not pertain to him; and the Narrative of the Inhibition is, that the Debitor intends to defraud his Creditor, by putting away his Lands, which does not militate, as to Lands which he has not then.

S. Seeing the Inhibition once affects the Person there is no Reason why it should not affect Lands after acquired, if duly execute and registered, *as above.*

N. A Bond being granted after Inhibition, and thereupon the Debitor being denounced, and his Escheat gifted. *Quæritur,* If the Horning and Gift may be reduced *ex Capite Inhibitionis? Ratio Dubitandi,* That the Ground being taken away the Superstructure falls, so that the Bond being

being reduced the Horning doth fall. *Contra*, The King is not concerned upon what Ground the Rebel is at the Horn, if the Horning be valid and formal; and the Inhibition doth import only, that the Debitor ſhould not give any voluntar Right, whereupon his Eſtate (which is the Subject of Execution for Debt) may be taken away; but not if he ſhould commit Crimes, either of Treaſon, or ſhould be Rebel, or do Deeds wherupon Recognition may follow; That the King or other Superiors ſhould be prejudged of their Right and Caſaulities of Forefaulture, Liferent-Eſcheat, *&c.*

S. Neither Horning nor Gift, can here be reduced *ex Capite Inhibitionis*, nor will they fall *in Conſequentiam*; becauſe, if the Horning be valid and formal, the Gift thereon is good: For, The Inhibition doth only inhibit the Debitor as to voluntar Rights, whereby his Eſtate may be taken away: But if he commit Crimes, the Law and the Superiors Intereſt muſt ſtill take effect. And, yet in good Reaſon the Inhibition ſhould ſave the Inhibiter, both as to the Debitor's Deeds, and his Delinquency upon them, as in Recognitions.

Inhibition upon Teinds.

N. If Inhibition upon Teinds interrupteth Preſcription, without a Citation; ſpecially where the Poſſeſſor is in Poſſeſſion by a Right?

If Inhibition puts a Party bruiking by a Right, *in mala Fide*; ſo as, before his Right be reduced, to be liable for By-gones after the Inhibition. *Tweeddale.*

If to the Effect forſaid he be *in mala Fide*; becauſe being Commiſſioner for the Earl of *Lauderdale*, he prevailed upon the ſame Grounds againſt *Oxenford.*

S. It is thought, an Inhibition upon Teinds doth interrupt Preſcription, without a Citation of Spulzie.

Tho' it may be thought that a Party bruiking by a Right, ſhould be only liable for By-gones ſince the Citation in the *Reduction*; yet the Inhibition cannot but put him *in mala Fide*, even before the Reduction; albeit, this may be judged rigorous: And for what here follows it needs not be noticed But *Quod quiſque Juris in alium ſtatuerit ut ipſe eodem Jure utatur*, is good Law.

Inſinuatio.

S. This, and the following Titles; *Inſtantia, Inſtrumentum Guarentigiatum, Inter decem dies*, are but *Latin* Citations.

Inſtance.

N. By the common Law of the *Romans*, and by the Cuſtom of *France*, *Inſtantia perit* after Three Years, as to all Effects of it; *v. g.* Interruption of Preſcription: But without Prejudice of the Action, if it be not preſcribed, ſo that a new Action may be intented.

S. That this was the common Law of the *Romans*, is not made appear.

Interdiction.

N. IF Interdictions be null, becauſe the Executions do not bear O. yeſſes?

S. If the Execution do bear lawful Publication to have been made, the O Yeſs's may be thought to be implied: But the Meſſengers ſhould expreſs it: For the Law and Cuſtom is his Rule.

N. If a Perſon having no real Eſtate, but perſonal Bonds, May he not be interdicted if there be Cauſe; at the leaſt that he cannot give away his Eſtate without an onerous Cauſe? *Ratio Dubitandi,* Interdictions are thought only to affect Immoveables.

S. 'Tis true, Interdictoins are only thought to affect *Immoveables.* But if a Perſon were interdicted *cauſâ cognita,* it were very fit that he ſhould be bound up even as to perſonal Bonds and his perſonal Eſtate; except for onerous Cauſes, and bating a little for the Intereſt of Commerce; to which the Rule agrees well, *Mobilia non habent ſequelam.*

N. If a Husband can be interdicted to his own Wife, being *in ejus poteſtate & cura.*

S. That a Husband ſhould be interdicted to his own Wife, ſeems to be *contra bonos mores.*

N. If an Interdicter can conſent to a Deed in his own Favours?

S. An Interdicter cannot conſent to a Deed in his own Favours, becauſe not agreeable to his *Truſt.*

N. If Interdiction be looſed, Will Debts contracted in the *Interim* be valid? *Ratio Dubitandi,* That by the looſing 'tis acknowledged that he is not *prodigus:* And ſeeing no Act of Prodigality or Facility before or after can be inſtructed, *ex extremis præſumitur medium,* and that he was not prodigal in that *Interim.*

S. Interdictions are oft-times looſed by the Interdicter's *Reducing,* to which no Oppoſition is made: In which Caſe, Deeds done in the *Interim* cannot be quarrelled by it; for 'tis reduced *tanquam ab initio.*

N. If the Heir of a Perſon interdicted will be liable to a perſonal Execution, or real againſt his Moveables?

S. It is thought the Heir of a Perſon interdicted will be liable as his Predeceſſor was: But this Caſe is very unclear.

Intromitter.

N. THERE being a Difference between an Executor confirmed after Intromiſſion, and a Donatar to the Defunct's Eſcheat, tho' declared; *viz.* That the Executor is liable to the Creditors, but not the Dona-

Donatar: *Quæ Ratio* that the Eſcheat declared ſhould free the Intrometter?

S. The Reaſon why the Eſcheat declared ſhould free the Intrometter, appears to be, That the Eſcheat declared cuts off the Defunct's Right *ab initio*: Whereas the Executor is ſtill liable to the Creditor; Yet if the Declarator be after intenting of the Cauſe againſt the Obtainer as Intrometter; I doubt it would free him.

Invecta & Illata.

N. IF a Perſon aſtricted as to *Invecta & illata* tholing Fire and Water, ſhould buy unground Malt, and after he had brought it within the Bounds aſtricted, has ſold it; Will he be liable to aſtricted Multures?

S. He ſhould not be liable, becauſe it did not thole Fire and Water by him, within the Bounds.

Duobus inveſtitis per modum Confirmationis, ſed poſterius acquirentis jure prius confirmato; Uter ſit prior?

N. *CUM prædia alienantur de ſuperiore tenenda, id fit vel per modum Reſignationis vel Confirmationis: Si igitur Alienatio fiat de Domino ſuperiore tenenda, per modum confirmationis, & ex ea ſaſina ſecuta ſit: Poſtea verò alienatio terræ eodem modo tenendæ alteri fiat, & ex ea nedum ſaſina ſed confirmatio acceſſerit, ac denique prioris acquirentis jus ſed poſterius, confirmatum fuerit:* Quæritur, *Ex iis acquirentibus uter potior ſit? Et quidem dubitationis ſi ulla, ea ſubeſſe videtur ratio, quod per Reſignationem alienans penitus deveſtitur: Saſina autem cùm ſit, in re, plus poſſe & tribuere videtur quam reſignatio quæ ad rem tantum eſt: verum exploratı juris, eſt poſterius acquirentem potiorem eſſe, cum prior nactus ſit jus perfectum, & omnibus numeris & partibus abſolutum, idque a poteſtatem habentibus; alienans ſiquidem nec alienatione nec ſaſina priori data Dominus eſſe deſiit, & penes quem eſt dominium, penes eum remanet poteſtas alienandi per quam dominium definitur: ſicut autem alienatio alienanti dominium haud adimit cum ſit jus perſonale, nec in re tantummodo, ſed ad eam conſequendam, ita nec ſaſina ex ea diſſaſitur; cum ſit prorſus nulla & irrita utpote prædii de domino directo tenendi: nam ſaſina prædii de aliquo tenendi inanis & ſaſina haud cenſetur, niſi iis de quo tenendum eſt prædium vel per ſe vel per Balivum ſuum eam dederit, vel per alienantem dandæ vel prius datæ, confirmatione ſua conſenſum & autoritatem accomodaverit.*

Ex iſtis eluceſcit quanti Momenti ſit habilis agendi modus; at enim apud Phyſicos tria rerum naturalium dicuntur eſſe Principia, Materia Forma & Privatio; totidem etiam apud Juriſconſultos rerum agendarum ſtatuuntur principia, Poteſtas ſcilicet, Voluntas & Modus; ſine Poteſtate velle vel conari dementia eſt, ſine voluntate poteſtas iners, nec in actum

ſeſe exſerit; ſi adſit utraque, tum poteſtas quam voluntas ſuffic[illegible] ſit autem modus habilis & ad actum explicandum idoneus, actus [illegible] inefficax eſt; Forma enim et Modus (ut vulgo dicitur) dat eſſe rei: Et haud fieri, & haud rite & debito modo fieri, *paria ſunt. Cum igitur acquirens omiſſo modo acquirendi per reſignationem, quod reſignatione facta, tam alienanti quam alteri, tum alienandi tum acquirendi poteſtas præripiretur, iſtum per confirmationem maluerit; in eum quadrat (quod multis aliis caſibus locum habet) illud Brocardicum,* Quod potuit noluit, quod voluit facere nequivit.

S. In this Caſe of Two Purchaſers by Diſpoſitions and Infeftments to be holden of the Superior by Way of Confirmation *a me,* where the Firſt Purchaſer, tho' he take Saſine, yet is confirmed in the Second Place: The Author reſolves well, That the firſt confirmed, tho' not firſt infeft, will be preferred; becauſe indeed a Saſine in this Caſe hath all it's Force from the Confirmation. But *he* miſerably falls into his conſtant Error, That this Caſe differs from Purchaſers by Reſignation; as if the firſt Reſignation did wholly diveſt the Reſigner: Which is a Miſtake: For, the Right remaining radically in the Reſigner; the firſt Infeftment upon the ſecond Reſignation is preferred to the poſterior Infeftment on the firſt Reſignation. And the Reſigner is judged to be totally denuded, not by the Superior's accepting of Reſignation, but by the Infeftment upon it.

Jura complexa.

N. *JURA complexa* as Eſcheats ſingle, Societies for certain Years, Do theſe fall under Executry? *Ratio Dubitandi,* The Subjects are *Mobilia*: *Contrà,* they are not liquid, and cannot be valued; ſo that there can be no *appretiatio* or *male appretiata.*

S. Tho' theſe Subjects are not liquid, nor can be appretiate; yet, being moveable, they may fall under Executry, and be purſued upon a Licence; and when liquidate, then confirmed and execute.

Inveſtitura.

S. This and the following Titles, *Juramentum, Juriſdictio, Juriſdictio Cameræ Imperialis,* are but Citations.

Jus accreſcendi.

N. WHEN a Sum of Money is payable to a Widow in Liferent, and to the Children of her late Marriage in Fee: *Quæritur,* If any of the Children ſhould deceaſe, Whether their Part will accreſce to the Survivers? Or, If they muſt be Executors or Heirs to the Child deceaſed? *Ratio Dubitandi,* That the Fee is not given to Individuals *nominatim,* but to Bairns & *liberis*: And before it be declared that they have Right as *Liberi,* and ſo the Fee eſtabliſhed in their Perſon, they are deceaſed: And therefore *locus eſt juri accreſcendi*; as in the Caſe of Heirs Porti-

Portioners before they be ſerved Heirs, if ſome of them deceaſe, their Right will accreſce to their Survivers.

S. If the Right tranſmit to the Bairns, *qua* Bairns, the *Jus accreſcendi* ceaſes: But if the Tranſmiſſion require any Solemnity; I ſhould judge with the Author, That there is *Jus accreſcendi* before the Tranſmiſſion.

Jus Mariti.

N. MARRIAGE being diſſolved within Year and Day, the Huſband, by our Cuſtom, has neither Tocher nor any other Benefit by the Law as Courteſy: Neither the Wife, if ſhe ſurvive, will have Jointure or Terce, if there be no Children. *Quæritur*, If the Husband has not *Jus mariti* as to Moveables, whether extant or conſumed? *Ratio Dubitandi*, Theſe other Proviſions are preſumed to be in Reſpect of a Marriage durable and ſtanding, at leaſt for the ſaid Space: Whereas the Right foreſaid is founded upon the Relation of *Maritus: Et ipſo momento* that he was married he was Husband. But it ſeemeth, That, ſeing the Wife would not have *jus Relictæ* by the Death of her Huſband, he ſhould not have *jus Mariti*; *ne ſocietas iniqua & leonina ſit:* But as to *bona conſumpta*, it ſeemeth that *fecit ſua* being *bona fide* Poſſeſſor.

S. It is known, That Marriage being diſſolved within Year and Day, and no Children, all diſſolves *retro*. But the Queſtion here is moved as to the *jus Mariti*. And ſeing the Wife has not *jus Relictæ* by the Death of her Husband, neither ſhould he have *jus Mariti*. Yet the Title and *bona fides* ſhould make good what is *bona fide conſumptum*.

N. If a Husband lying at the Horn, and being thereafter relaxed, will loſe only the Mails and Duties of his Wife's Lands reſting before and becoming due during Rebellion? Or, If his *jus Mariti* and Right to theſe Mails and Duties, during the Marriage, will fall entirely; ſeing he might Aſſign his *jus Mariti*; and his Right not being during Life, he is in the Caſe of an Aſſigny to a Liferent, which falleth under the Aſſigny's ſingle Eſcheat?

S. 'Tis thought, That the *jus Mariti* does not give the Husband a formal Right to the Wife's Liferent, but is only like an Aſſignation to Mails and Duties, that gives Right to them as they fall due. And therefore, if the Wife's Liferent-Eſcheat ſhould fall, as in ſome Caſes it may; it might be thought, That it ſhould belong to the King and his Donatar, and cut off the *jus Mariti*, as a formal Aſſignation to a Liferent cuts off a prior Aſſignation to Mails and Duties.

N. If a Proviſion in a Contract of Marriage with a Widow (having given a Tocher) that her Husband ſhould not have *jus Mariti* to a certain Sum, nor to any other Snm except the Tocher (ſpecially ſhe having divers Children of her firſt Marriage) be not valid?

S. I was, and am ſtill of Opinion, That the *Jus Mariti* may be regulate *per pacta nuptialia*.

N. A Bond being conceived in Favours of a Woman conditionally, who thereafter Marrieth, and dieth before the condition exist: *Quæritur*, If the Husband will have Right *Jure Mariti? Answer*, He will, *per Legem quæ Legata. ff. de Reg. Juris.*

QUID Juris, As to the conditional Legacies, if the Condition exist after the Husband's Death, if they will belong to her self? *Vide* the said Rule, and the Reason of the Difference.

S. It is thought, the Husband will not have Right to the said Bond: For, since the Condition did not exist; and thereby the *Dies cedere*, until the Marriage was dissolved; it cannot be thought to pertain to the Husband, who could not exact it. And the Law cited, *quæ Legata. ff. de Reg. Juris*, makes not to the Purpose; tho' it may fall to her Executors. Thus, if the Wife were Debitor conditionally, the Condition existing after the Marriage, the Husband would not be liable.

And a conditional *Legacy* being left to a Wife, if the Condition exist not till after the Husband's Death, it will belong to her self; for the Legacy does not fall due until the Condition exist.

N. If *Jus Mariti* may be compriſed? And if it may, whether the Right will fall under the ſingle Eſcheat of the Compriſer?

If a Husband be forefaulted; *Quæritur*, if his *Jus Mariti* falleth under the Forefaulture? *Ratio Dubitandi.* The Husband has *Jus Mariti*, upon Pretence, and in order to Adminiſtration; and the Law preſumeth that he will adminiſtrate as he ought: And the Relation and *Jus Mariti hæret Oſſibus*, and is perſonal.

S. It is thought the *Jus Mariti* may be compriſed: And yet this *Jus Mariti* would fall under the Husband's ſingle Eſcheat; and ſo would it under the ſingle Eſcheat of the Compriſer: But ſtill the *Jus Mariti* is but an Aſſignation to Mails and Duties, and only affects things as they fall due. And if the Husband ſhould be forfeited, his *Jus Mariti* could not but *multo magis* fall under the Forfeiture. But all theſe Rights, either of Eſcheat, Forfeiture, or Compriſing, would fall with the Marriage, for they could endure no longer.

N. There being a Proviſion in a Contract of Marriage; that the Woman ſhould be excluded from any Intereſt in Terce or third of any other Part of Moveables; ſo that the Terce is no Communion as to her; *Quæritur*, If notwithſtanding there will be communion as to the Husband, ſo that he will have *Jus Mariti*, as to any moveable Eſtate belonging to his Wife?

S. Tho' this *Proviſion* may exclude the Wife as to her *Jus Relictæ*, yet it will not exclude the Husband from his *Jus Mariti.*

N. A Woman having Right to an heritable Sum, if Diligence and Charges be uſed for Payment: *Quæritur*, If *ipſo jure* it becomes moveable, ſo that the Husband has thereafter Right *jure mariti?* Answer, It is thought, That as to the Deciſion of this Queſtion, much will depend upon Circumſtances; and if Diligence be uſed in order only to ſecure the Sum, and that the Debitor be ſuſpect, the Sum will be ſtill heritable; ſpecially, if Adjudication follow in Favours of the Wife and her Heirs.

S. It

S. It is thought that this Diligence, as for Example, a Charge of Horning, tho' it would make the Sum eſcheatable; yet ſhould not make it fall under the *Jus Mariti*: For ſince the Husband is Husband, and hath the Adminiſtration, it were iniquous to interpret this ſo much to the Wife's Prejudice as to loſe the Fie of an heretable Sum; and if the Sum ſhould come to be adjudged for, it would certainly remain with the Wife.

N. Quæritur, If a Proviſion in a Contract of Marriage, That the Wife ſhould retain a Right of Sums belonging to her; and, That ſhe may diſpoſe of the ſame without Conſent of her Husband, be valid, and to be ſuſtained? Answer, *Affirmativè*, ſeing ſuch Pactions are not *contra bonos mores* or *Jus gentium*: But on the contriar, are conform to the *Roman* Law. And when any Advantage is introduced in Favours of a Husband, or any Perſon *jure poſitivo* or *municipali*, they may renounce the ſame.

S. It is moſt reaſonable that this Proviſion ſhould hold; for the *Jus Mariti* ſhould always be ſubject to the *pacta nuptialia*.

N. Quæritur, If the Husband be liable to the Wife's Debts, & *quatenus*? Answer, It is thought, he ſhould be liable; *quia penes quem emolumentum, penes eum onus*: But 'tis thought he ſhould be liable only *quatenus locupletior*, and according to his Intromiſſion, and as a Tutor; the Wife being *in Tutela mariti*: And tho' he has Right *jure Mariti & Communionis*, to that which belongs to his Wife; that ſhould be underſtood *debitis deductis*.

S. The Husband, no Doubt, is liable to all the moveable Debts of the Wife: But the Author thinks him only liable as a *Tutor*, and *quatenus locuptetior*; And that his *Jus Mariti* gives him Right to the Wife's Moveables *diductis Debitis*. But it is better *Law*, That the Husband *jure Mariti* getting the *Univerſum Jus* of the Wife's Moveables, *Debita cum eo tranſeunt*: And he having the Adminiſtration, and Marrying for *Better* and for *Worſe*, during the Marriage he muſt be ſimply liable for all her Debts, until the Diſſolution bring a Remedy.

N. If, after the Marriage is diſſolved, it be found that there was a Debt belonging to the Wife during the Marriage: *Quæritur*, If the ſame will belong to the Husband ſurviving, *Jure Mariti*? *Anſwer*, It is thought, The Law gives what belongs to the Wife, to the Husband as Adminiſtrator; and the Law preſumes that he adminiſter behoovefully: But if a moveable Debt was not known the Time of the Marriage, and is yet due, there may be ſome Queſtion; and yet it is thought, that it ſhould fall under the Communion.

S. If, after the Marriage is diſſolved, there be found a moveable Debt that belonged to the Wife during the Marriage, it ſhould belong to the Husband ſurviving. And in like manner, If a moveable Debt, due by the Wife, did emerge after her Death, tho' her Dead's Part were exhauſted, yet the foreſaid New-diſcovery in the Husband's Favours ſhould anſwer it: But otherwiſe this poſthumus Debt of the Wife's, would not affect the Husband after the Communion diſſolved.

N. If the Wife be provided in Satisfaction of Terce or Third; *Quæritur*, In that Case, If such a Bond will fall under Communion, or if it will belong to the Husband *Jure Mariti?*

S. This Case should be more clearly stated; for if it be a liquid Bond given her for that Cause, there can be no Reason why the *Jus Mariti* should not affect it except it were renounced, unless the Husband's Transacting for it, be thought of the same Force.

Jus Mariti & Relictæ.

N. IF the Loss arising by the Act of Parliament anent *Unlawful Ordinations and Marriages*, be understood to be a Privation; so that such Rights cease as if they were not Married; *amittuntur, non commutantur*; and the Wife and Husband have a Right to their own Estate, free of *Jus Mariti & Relictæ*, as if they were not Married?

S. By the Act of Parliament, *Ca.* 2. *Pa.* 2. *Sess.* 3. *Cap*, 9. Persons Married by one not lawfully ordained, do amit their *Jus Mariti* and *Jus Relictæ:* And the plain meaning appears to be, That *Both* being equal in the Transgression the Husband has no *Jus Mariti* during the Marriage, and the Wife no *Jus Relictæ* upon the Dissolution; But it does not seem that it was taken from them *tanquam ab indignis*, to belong to the Fisk. But it is no matter, for the Act is rescinded.

Jus Relictæ.

N. A WOMAN, by Contract of Marriage being provided to a Liferent of all that should be conquest, whether Lands, Sums, or Goods; *Quæritur*, If she will have Right to the Half or Third of the moveables *Jure Relictæ?* or if *eo ipso* that she is provided to, and accepteth a Liferent, it appeareth that she renounceth her Communion? Whereas on the other Part, that Provision being in her Favours, and she not being excluded; it seemeth she and her Executors should not be excluded by it.

S. The Wife cannot in this Case, have both her *Jus Relictæ* and her Liferent of the Moveables; but hath her *Choice*, since the Provision of Conquest is in her Favours,

N, If the Husband may, by Donations in *Liege poustie*, prejudge the Wife and Bairns of their Part? *Answer*, The Nature of the Gifts is to be considered, if they be so *immodicæ & inofficiosæ*, as it may be presumed, they are given of purpose to frustrate them.

S. Tho' the Husband should dissipat and give all away, there appears no Remedy: For since he may ruin *himself*, the Law has provided no Remedy in this Case for the Wife and Bairns.

Jus Superveniens.

N. IF a Person having no Right to Lands should dispone the same, so that the Acquirer should be infeft upon his Resignation; and thereafter the Disponer should acquire the same; and being infeft upon the Resignation of the Heretor, should dispone and resign in Favours of another for onerous Causes, so that he should be infeft: *Quæritur*, Which of these, who acquired these Lands from the same Author, will be preferred?

S. It may seem, that the After-acquisition should accresce to the first Purchaser: But, if the Time of the First, the Resigner had neither Right nor Possession, and should again resign on the Ground of the better Right acquired, it would alter the Case.

N. That Brocard, *Jus Superveniens, &c.* will it hold in the Case where the Right is supervenient not to the Disponer, but to his Heirs? Or where the Heir to the Disponer had Right himself the Time of the Disposition?

S. If the Disponer and *his Heirs* be bound to *warrand*, it seems, That where the Heir is bound in the Warrandice, any Right in, or falling to his Person, must accresce to the Purchaser, but otherwise not.

N. Quær. *QUO casu Jus Superveniens accrescit?* And if it should be understood of the Right only of Moveables, and such Things as may be transmitted without Infeftment? And not of Lands and others, which cannot *habili modo* be conveyed, much less accresce, without Infeftment?

S. The Accresceing of a Supervenient Right, is here meant of a Right *supervenient* to the Author, and then accresceing to the Purchaser; which, *fictione Juris*, is presumed to have been in the Author's Person when he disponed; which makes a sufficient Conveyance. As for the *Jus accrescendi* of the Civil Law *in Legatis*, it is of a quite other Nature.

Justice-General.

N. IF the Justice-General may be Judge to Riots, or any Crime or Delict, whereof the Pain is not defined by Law, but left arbitrary?

S. It may be thought strange, how this comes to be doubted, when almost every Day that Court finds Libels relevant, *ad Pœnam extraordinariam*, which is *Arbitrary*.

K.

Neareſt of KIN.

THE Intereſt of the Neareſt of Kin is, That they be confirmed Executors, and if they die before Confirmation they do not tranſmit: And yet if the Teſtament be confirmed by any Perſon, *naſcitur Actio* againſt the Executor, who is liable to the Neareſt of Kin, which they tranſmit.

THERE being three Perſons who are neareſt of Kin to a Defunct, and the Edict is moved and ſerved at the inſtance of the Procurator-fiſcal, and Two confirmed only: Whether will the Third have Action againſt the other Two, as Neareſt of Kin for a Part? *Ratio Dubitandi*, That theſe who are Executors of Law cannot have Right *de facto*; unleſs they confirm, that being *modus adeundi in mobilibus*: And the Neareſt of Kin, by the Act of Parliament has only an Action in the Caſe where he cannot *adire*, there being Executors nominate and confirmed, who have Right to the Office, and a third Part; ſo that the Neareſt of of Kin may purſue for the Reſt.

WHEN the Neareſt of Kin have Action againſt the Executor Nominate, if ſome of them deceaſe before Confirmation, whether will they tranſmit the foreſaid Action? *Ratio Dubitandi*, it is not *Officium*, but *Jus Legitimum*, which may be tranſmitted, as the Relict's Part and Bairn's Part, without reſpect to the Confirmation: And on the other Part, it may ſeem, that ſeeing they did not intent Action before their Deceaſe, they do not tranſmit; and in ſuch Caſes the intenting of Action is *inſtar Aditionis* and there is no Repreſentation in Moveables.

THERE being Two Daughters, of which One being married, by her Contract of Marriage accepts her Tocher in Satisfaction of what ſhe may pretend to by the Deceaſe of her Father and Mother: *Quæritur*, The Father having ſurvived the Mother, Whether will the other Siſter have entirely her Mother's Part, as neareſt of Kin to her? *Ratio Dubitandi*, The other had renounced. And on the other Part, the Mother's Part did entirely belong to herſelf and to her neareſt of Kin: And the ſaid Siſter that renounced is as near to her Mother as the other? *Vide Renunciaton, litera* R.

S. THE Neareſt of Kin are in a manner Succeſſors *in mobilibus*, and if they confirm they tranſmit; or if any other confirm, he will be liable to them, and this *Claim* they alſo tranſmit: But of this Tranſmiſſion of the Neareſt of Kin more afterwards; 'ſpecially, If the Neareſt of Kin muſt not only confirm but execute, before they can tranſmit.

THERE being three Perſons Neareſt of Kin to a Defunct, and the Edict being moved at the Inſtance of the Procurator-fiſcal, Two of them only are confirmed: What becomes of the Third? And the Author ſeems to ſay, That Confirming being *modus adeundi in mobilibus*, the Confirmer ſhould have Right, and that the Neareſt of Kin have only their Claim without confirming, where there is an Executor nominate and confirming that bars them. But put the Caſe, That the Procurator-fiſcal

fiscal, who moved the Relief, had gone on to confirm; would he not have been accountable to all the Three Neareſt of Kin? Can we then think that the Third's Neglect in the former Caſe ſhould be ſo penal? And therefore 'tis more reaſonable, that the Teſtament being confirmed *quovis modo*, the Neareſt of Kin ſhould have their Claim; for the *Executor* is principally an *Office*, and in no Reaſon ſhould exclude the Right of Blood, except by the Defunct's Will or by Law, it be otherwiſe provided.

When the Neareſt of Kin, have Action againſt the Executor nominate, if One of them deceaſe before Confirmation; the Author ſays, That his *Ligitimum*, or Share of the Dead's Part, ſhould tranſmit as the Relict's Part, and Bairn's Part. And a Man would think ſo in good Law: But he would have the Neareſt of Kin to intent Action, before his Deceaſe, that he may tranſmit; for this Intenting of Action, he, judges to be *inſtar Aditionis*, without which no Repreſentation in Moveables. But then, this Action cannot be intented unleſs the Executor nominate firſt confirm, and ſo this Neareſt of Kin dying before his Part muſt not tranſmit. But *Secondly*, To require farther, That he ſhould intent Action that he may tranſmit; and that this is *inſtar Aditionis*, is wholly groundleſs: For indeed, to take our Executory as it is, which at beſt needs a great Reform; any Executor's Confirming, ſhould found the Claim of the Neareſt of Kin: But one of the Neareſt of Kin dying before confirming, our Pratique ſeems to allow him to tranſmit nothing ſave his *Bairn's Part*, as we may hear afterwards.

As to the Caſe of the Two Siſters. It is true, That the Mother's Part did entirely belong to her ſelf, and to the Neareſt of Kin; and the married Siſter is equally near to the Mother: But why did ſhe then renounce or what ſhould be the Effect of that Renunciation? Certainly it muſt be to cut her off, as if ſhe had not been: And then the Mother dying before the Father her Part muſt fall entirely to the other Siſter.

KING.

N. If the King take Burden in a Diſcharge granted by a Minor, That he ſhall Ratify at perfect Age: *Quæritur*, Whether the King's Succeſſors will be liable, repreſenting their Predeceſſors? *Ratio Dubitandi*, The King ſucceeds not as Heir, but *jure Coronæ*: As in the Caſe of ſingle Incorporations; *v. g.* Biſhops, who are ſaid to be Succeſſors, and are not liable to the Debts of their Predeceſſors: Or, In the Caſe of *Feuda ex pacto & providentia?*

If the King be in the Caſe of other Minors; ſo that a Revocation is not ſufficient, unleſs a Reduction be intended *debito tempore intra quadriennium utile?*

S. The King taking Burden for a Minor in a Diſcharge, That the Minor ſhall ratify at perfect Age, doth in that Caſe bind *jure privati*, and not as King: And ſo it cannot oblige his Succeſſors in the Kingdom: But it ſhould bind his Repreſentatives in any private Eſtate that may belong to him. And if he have no private Eſtate, there is no Remedy.

Kings are commonly judged to be Minors wherever they are leſed: And for that End their Revocations are in uſe: Which, tho' ſometimes made *intra quadriennium utile*; yet if the Court incline it, may be made

at any Time: Only [illegible] tion upon it, can have no Effect. [illegible] ed without ſpecial Warrant. And *in rei veritate*, [illegible] tion ſhould only be allowed as to the *annexed Property*; but otherwiſe only *intra* the *quadriennium utile*.

King and Prince.

N. IF the King and Prince be to be conſidered as incorporate; ſo that theſe who ſucceed are in the Caſe of Succeſſors of Church-men, and do not ſucceed by Inheritance, but by Succeſſion?

S. THAT *King*, or *Prince*, or *Biſhop*, are like ſingle Incorporations, as the Author calls them, ſeems very improper. But certainly all of them ſucceeding, do ſucceed in the Office and Patrimony; and that according to Law; but not as Heirs to their Predeceſſors. The Author ſays, *That they ſucceed not by Inheritance, but by Succeſſion:* Which is, That they ſucceed not by Inheritance: For the Reſt is *idem per idem*.

L.

Laudimium.

S. HERE we have only *Latin* Citations. The Word ſignifies Entry. Duty; much the ſame with the Εισδεκτικον.

Lawburrows for Burghs.

N. IF a Burgh be liable to find Lawburrows for their Burgeſſes?

S. THERE appears no Law for it, that a Burgh is liable to find Lawburrows for their Burgeſſes, tho' they ſhould be anſwerable to exhibit them, if in their Power, in caſe of their Tranſgreſſion.

In Lecto.

N. IF a Perſon having Baſtard-Children may *in Lecto* marry their Mother, in order to their Legitimation?

S. THO' this hath been practiſed and allowed; yet it appears the worſt Deed that a Man can do on Death-bed in Prejudice of his Heirs. But poſſibly it hath been ſuſtained, as done *ad exonerandam conſcientiam*: Which may be thought ridiculous.

N. IF after a Capital Sentence the Perſon condemned be *in legitima poteſtate*; ſeing he cannot be ſaid to be *in Lecto*: And the Sentence doth not affect *Immobilia*.

S. A

S. A Perſon condemned cannot be ſaid to be in his *leige Poustie*; being, as they ſay, a Son of Death, and his Life merely precarious. Yet, if he ſhould eſcape from Execution, ſpecially into Freedom and Safety; *that* may be thought to alter the Caſe: And his Deeds *quoad* his Heritage would be more probable.

N. If a Man on Death-bed be acceſſory to Treaſon, Whether will his Eſtate forfault in Prejudice of his Heir? *It ſeemeth*, That tho' *in Lecto* Lands cannot be ſold or annailzied any Way in Prejudice of the Heir, that being only the Caſe of the old Law of Deeds *in Lecto*: Yet conſequentially a Man on Death-bed may do many Deeds in Prejudice of the Heir: And a Traitor on Death-bed may be taken out and puniſhed.

S. Tho' a Man cannot on Death-bed prejudge his Heir by voluntar Diſpoſitions; yet if he ſhould commit Treaſon, he would certainly forfault his Eſtate from his Heir; for ſuch is the Force of the Law.

N. If a Bond being Heritable, may be made moveable of Purpoſe *in Lecto?*

S. If the Thing be done *on Purpoſe*, and can be ſo made appear, it is the ſame Caſe as if the Bond were legate, which cannot be. But if an heritable Bond ſhould be made moveable, by a Diligence, on Death-bed, without any declared Deſign, it may be reaſonably thought, That the Diligence is only uſed for further Security, but without any Purpoſe in the Creditor to alter his Succeſſion from his Heir to his Executor.

N. If an Infeftment be given of Lands holden Ward, upon the Reſignation of the Father *in Lecto*; and a Reverſion apart to the Father, to redeem upon a Roſe-noble; *Quæritur*, If the Ward and Marriage be cut off? Answer, If the Lands hold of a Subject, *Sibi imputet* that he did not enquire and know the Condition of the Diſponer: But if they hold of the King, there may be ſome Queſtion; ſeing the King's Grants may be queſtioned upon Obreption or Subreption, and the Negligence of his Officers ſhould not prejudge him: And it appears the Courſe foreſaid, was taken of Purpoſe to defraud the King of his Caſualities, being *in ſpe proxima*; and the Diſponer having provided for himſelf, that he ſhould be Maſter of his Eſtate, by the Reverſion foreſaid. It is thought there is a Deciſion in the ſaid Caſe, in Favours of the King, which ſhould be tryed.

S. Tho' there may be a Difference where a Subaltern, or, the *King*, is Superior; as if the Subaltern ſhould advert better, and know the Condition of the Diſponer more perfectly: Yet, even where the *King* is Superior, if the Reſignation be fairly managed, there is no Reaſon, that the Thing ſhould be queſtioned: For, the Diſponer *utitur jure ſuo*, and if the Reſignation be accepted in the common Courſe, tho' it were deſigned to cut off the Ward and Marriage, yet it ſhould be ſuſtained, ſeing *qui utitur jure ſuo nemini injuriam facit.*

N. A Perſon on Death-bed having made a Diſpoſition in Favours of a Creditor, but to the Prejudice of his other Creditors, (the Defunct's whole Eſtate being diſponed in Favours of the Creditor foreſaid.) *Quæritur*, If the Defunct could on Death-bed prejudge his other Creditors, and prefer one to all his other Creditors? Seeing Perſons being on Death-

bed are not in *Liege Pouſtie* as to any Deeds but the making of Teſtaments; and not as to Deeds *inter vivos* and if the Defunct in his Teſtament had made ſuch a Conveyance in Favours of a Creditor, it could not been ſuſtained; and any Deed done on Death-bed is upon the Matter but a Legacy or Codicil: And a dying Perſon ſhould not be allowed to do any fraudulent Deed; and it is a Fraud, where there are many Creditors, to give to one the whole Eſtate: And a Perſon *in Lecto* cannot prejudge his Heir; and *a fortiori* ought not to prejudge his Creditors, who would be preferable to Heirs. And as in the Caſe of Compriſings within Year and Day all Creditors ſhould come in *pari paſſu*, ſo Diſpoſitions on Death-bed ought to be to the Behoof of all other Creditors?

S. When a Perſon on Death-bed makes a Diſpoſition in Favours of *ſome* Creditors, to the Prejudice of *others*, 'tis thought, That the Creditors excluded may quarrel the Preference even in the Right of the Heir: For unleſs the Diſpoſition on Death-bed were made in Favours of all the Creditors, the Heir is prejudged, as being more expoſed to the Creditors neglected. The Grounds alledged by the Author againſt this Practice, appear to be not ſolid. For, *Firſt*, Nothing hinders a Perſon on Death-bed to diſpone upon his Lands, if he have the Conſent of his Heir: For, all Deeds on Death-bed are not to be judged Teſtamentary. *Secondly*, Since the Diſponer is under no Diligence, the Creditors neglected can neither complain of Fraud nor of partial Preference.

N. A Defunct having on Death-bed made a Diſpoſition relating to a former, and in Corroboration of it did nominate Two of his Name to ſucceed *Quæritur*, What will be the Import and Effect of it? Answer, It being on Death-bed, it cannot have the Effect of a Diſpoſition unqueſtionable; but only of a Declaration of the Defuncts will, which ought to determine (at leaſt to have Weight) the Friends.

S. 'Tis thought, this Diſpoſition on Death-bed in Favours of particular Subſtitutes, ſhould not be ſuſtained; for, in ſo far it is prejudicial to the Heir: Yet if the former Diſpoſition did wholly exclude the Heir, he can have no Prejudice by the Subſtitution *in lecto*, if lawfully made, by vertue of a Power reſerved.

N. If a Perſon ſtricken with a Palſy, ſo that he cannot go Abroad, but otherwiſe having ſound Judgment and Memory; if after a conſiderable Time he deceaſe in that Condition, will he be thought to be *in Lecto* after the contracting the Palſy? *Ratio Dubitandi*, That Perſons Paralitick cannot be ſaid to have *morbus ſonticus*; and diverſe, after they have been ſo, have been able to do Affairs and have had Children; and therefore it is thought, that it is to be conſidered, if there be a Complication of any other Diſeaſe, of which it may be thought that he died; and from the Time of the contracting that Sickneſs, he is to be eſteemed to be *in Lecto*.

S. This Queſtion is determined by the Act of Parliament 1696, making Death-bed as broad as Sixty Days before the Defunct's Deceaſe; and therefore the Nature of the Diſeaſe needs not to be inquired into.

N. What is the Reaſon, that a Third Party acquiring a Right made *in Lecto*, though *bona fide*, will be lyable to Reduction?

S. Re-

S. Reduction *ex capite lecti* will be ſuſtained againſt a Third Party acquiring *bona fide*, from the Receiver of the Diſpoſition from the Defunct, becauſe the Acquiſition is *a non habente*.

Legacies.

N. Quær. If an univerſal Legacy, which upon the Matter is a Teſtament, and *ultima Voluntas de neceſſitate Bonorum*, may be proven by the Oath of the neareſt of Kin? Answer, It is thought it may be ſo Proven, ſeing *Scriptura* is not *de forma Legati*; and a Legacy not exceeding an Hundred Pounds may be proven by Witneſſes; and a Legacy exceeding that Value is not probable by Witneſſes, not becauſe that *Scriptum* is *de eſſentia*, but *ob fluxam fidem teſtium*: And therefore, whatever Value it be of, it may be proven by the Oath of the neareſt of Kin.

S. It is thought, That tho' a ſpecial Legacy not exceeding a Hundred Pounds *Scots*, may be proven by Witneſſes; and if exceeding that Value, by the Oath of the Executor or neareſt of Kin: Yet an univerſal Legacy, being upon the Matter a Teſtament, as ſaid is, ſhould not be ſuſtained without Writ; for this appears to be a more ſolemn Act. And if an univerſal Legacy ſhould be probable by the Oath of the neareſt of Kin, Why not the Diſpoſition of a Man's whole Heretage, by the Oath of his apparent Heir, which yet our Law would reject.

N. If a Perſon being named Executor and univerſal Legatar, ſhall be forefaulted before he be confirmed, will his Intereſt forefault to the King? *Ratio Dubitandi.* albeit a Legacy will forefault, yet in this Caſe the Legacy being univerſal, and being ſubjoined to the Nomination, is of the Nature of Inſtitution; which, being an Office, does not forfault.

S. It may be thought, That this univerſal Legacy not confirmed, ſhould not forfault, becauſe the Right of it is only eſtabliſhed by confirming. For, if this Executor die, not confirming, he does not tranſmit, and what he does not tranſmit he ſhould not forfault. But this holds not as to apparent Heirs, in the late Rigour of Forfaultures.

N. If a Legatar ſhould commit Treaſon before the Teſtators deceaſe, will his Legacy be void, as in the Caſe of his Deceaſe? Answer, The Legatar not being *capax tempore mortis Teſtatoris*, having committed Treaſon, the Legacy is void.

S. If a Legatar commit Treaſon before the Teſtator's Deceaſe, the Lagacy will be as void as if the Legatar had died. For, a Legacy gives no Right except the Legatar ſurvive the Teſtator.

N. If a Legatar do not own the Legacy, may a Creditor affect the ſame? And if there be a Difference betwixt the Legacy and a Donation? *vide Donation non acceptata. in Litera D.*

S. Tho' a Legatar do not own the Legacy, yet a Creditor may affect the ſame: For, a Legacy is underſtood to give Right without a for-

mal Acceptation: And a Legatar cannot repudiate in Prejudice of his Creditors.

Conditional Legacies.

N. A Legacy being left to an apparent Heir, with that Proviſion, that the Legatar ſhould not queſtion the Defunct's Will, having diſponed his Eſtate both heretable and moveable to another, both by Diſpoſition and Teſtament: And a Clauſe irritant being adjected to the Legacy, That the Legatar ſhould both not impugne, and ſhould ratify the Defunct's Deed; and ſhould diſpone and convey any Right he had, in Favours of the ſaid other Party; and if he failzied or contraveened in either, that he ſhould loſe his Legacy. *Quæritur*, If the apparent Heir ſhould purſue an Exhibition *ad Deliberandum*, and being required, ſhould not be free to ratify and diſpone preſently; whether the Clauſe irritant be committed? *It is anſwered*, That the ſaid Legacy is not left in theſe Terms, that if upon Deliberation, having a Time granted for that Purpoſe, he ſhould think it his Intereſt rather to accept the Legacy than to own his Right of Succeſſion, he ſhould have the ſaid Legacy: But the ſamen is left, in caſe he ſhould cheerfully acquieſce to the Defunct's Will, which he is obliged to do preſently, being obliged to diſpone *Sine die*: *& ubi dies non adjicitur præſenti die debetur.*

S. It may be thought, That this apparent Heir might nevertheleſs purſue an Exhibition *ad Deliberandum*, that he might more knowingly make his Choice. But if it was provided, That he ſhould acquieſce in the Legacy, without moving any Queſtion, the Raiſing of the ſaid Exhibition might import an Irritancy.

Legal Reverſion.

N. IF a Minor have a Right to a legal Reverſion, as ſingular Succeſſor to the Debitor. *Quæritur*, if he will be in the ſame Caſe as a Minor that is Heir to the Debitor, ſo that he may redeem at any Time before he be of the Age of Twenty Five Years? Or if there be a Difference upon that Account, that the Heir or his Predeceſſor has Right *ab initio*; whereas the ſingular Succeſſor *Incidit in jus*; and the Reverſion being limited by the Law, in Favours of the Creditor, it ought not to prorogate by the Deed of the Debitor.

S. 'Tis thought, That a legal Reverſion ſhould not run againſt a Minor, whether he ſucceed to it as Heir, or as ſingular Succeſſor: For, the ſuffering it to run, is manifeſtly his Leſion; againſt which he ſhould be reſtored. 'Tis true, a Debitor, Major, may aſſign his legal Reverſion to a Minor, and by this Means prorogate it. As likewiſe, that the ſame Queſtion may be moved of a conventional Reverſion, that tho' limited, yet it ſhould not run againſt a Minor. But this *Laſt*, is doubted, for good Reaſons, tho' ſtill the running of Reverſions being infavourable, it ſeems ſafer to adviſe for the Minor.

Le-

N. IF Legatars may pursue Intromitters, and if the Defenders will be heard to debate whether there be free Gear?

S. I think, Not. But the Legatar had best confirm first, and then his Title would be good against any Intromitter.

Legatum Rei alienæ.

N. Quær. IF a Person on Death-bed should name his appearand Heir Executor; and should leave in Legacy to another an Heretable Interest, or should otherwise dispone Lands; whether or not the Heir confirming the Testament, may question the same as to the Legacy foresaid? But in this Case the Question will be, how far *Res aliena* (or such as is *aliena*, as to the Power of disposing the same *in Lecto*) may be left? And Testaments being favourable, and the Intention of Testators being most to be considered, whether or not the Executor should redeem that which is left in Legacy, being heretable, and be liable in Estimation and to the Value thereof, if it be *Res aliena*? Or should satisfie the Legacy if it be *res sua* but heretable, at least so far as the Executry will extend. *vide Death-bed, Quest.* 2 & 3, *Litera D.*

RES aliena si Legetur, non debitur nisi scíverit Testator rem alienam esse; non enim præsumitur Legare voluisse si scivisset rem alienam esse. Perez. Lib. 2. Tit. xx.

INCUMBIT autem Legatario probare Testatorem sciviſſe rem esse alienam, nisi conjunctis personis Legata fuerit: Pro quibus præsumitur ex affectu eum Legaturum fuisse etiamsi alienam, Perez. ibid.

UBI Legatur res hæredis valet Legatum, nec refert sciverit Testator, an non, hæredis esse; facile enim præstetur nec redemptione opus est. Perez. ibidem.

DOMINIUM rei suæ legatæ transit in Legatarium statim a morte Defuncti. Ibidem.

S. A Man's naming, on Death-bed, his apparent Heir, to be his Executor, and leaving an heretable Interest, or Piece of Land to another in Legacy; seems not to be so much the Case of *Legatum rei alienæ*, as, *Whither a Man may leave in Legacy from his Executor nominate, any thing belonging to the Executor himself, or that may belong to him.* And it is thought, He may. For, the Executor ought to consider the Testament; and if he please not the Legacy, he should refuse it: But if he confirm, he should make it good if it be in his Power.

THO' the Rule be *Legatum non deberi, nisi scieret Testator Rem alienam esse*: And that, *Incumbit Legatario hoc probare, nisi Legatum fuerit Personæ conjunctæ:* Yet I would think it a fairer Rule that in this Case, *Legatum rei alienæ* should not be sustained, *nisi Testator expresse ut alienam legasſit*: For otherwise, the *Legatum* should only extend *ad omne jus*, which the Testator or his Executor nominate, have in the Thing, without farder Inquiry.

Legatum ante Mortem Defuncti.

N. *SI Legatarius, vivo Teſtatore, rem Legatam conſequatur ex Titulo gratuito, ut Hæres; quamvis ſuperveniente poſtea Teſtamento, illa ei auferatur, non tamen ideo deſinit deberi Legatario; nec enim ſuperveniens Teſtamentum Titulum mutat, quo Legatarius vero Legatarius cum adeptus eſt Titulo lucrativo, aliter disponente Teſtatore, hinc inde ab Herede petere poteſt; nihil enim ei abeſt & duæ Cauſæ ſimul in unum Hominem, & unam Rem concurrere non poſſunt.* Ibidem, ex duobus Teſtamentis.

If Two Cauſes diſtinguiſhed, If the Legatary did acquire for a Title, in which caſe, the Legacy good, or gratuitous, and then not good: But it may be thought as juſt a Rule, That if he acquire from the Defunct himſelf, it ſhould extinguiſh the Legacy: But if from a Stranger, it is like *Legatum Rei alienæ.*

Legitima Liberorum.

" *N.* MORIBUS noſtris Primogenitus eſt Hæres ex aſſe; & in univerſum Jus immobilium: Teſtarum ſcilicet & aliorum quæ " immobilibus accenſentur: Nec minus ex mobilibus libet & patuit " mobilia Hæreditaria, vulgo *Moveable Heirſhip*: Et apud Anglos " *Heirloom*, optione permiſſa optimum quodque eligendi tamen ſuppe- " le quam ex Inſtrumentis ruſticis, & militaribus Armis, Equis, aliique " ejuſmodi; ut tam Domi quam Ruri ad colendum, & ſi opus ſunt " ad militiam & profectiones tum in Bello tum in pace utcunque ſit in- " ſtructus: Reliqua autem mobilia ſive res ſive nomina, Marito & Uxo- " ori & Viri Liberis, etiam ex diverſis Matrimoniis, (ſi adhuc in Fami- " lia) communia ſunt, deductis debitis, ſi Pater-familias obæratus ut " Debitor ſit; nec enim aliter bona intelliguntur niſi ære alieno ſub- " ducto: Ea communio licet ſit inter conjuges & liberos habitu & ſpe; " haud cedit tamen nec actu vim ſuam exerit, niſi Matrimonio diſſoluto " per alterius conjugis obitum. Matrimonio durante, rerum communium " non ſolum Adminiſtratio ſed Dominium eſt penes Maritum, & po- " teſtas diſponendi haud aliter quam de ſuis: nec ut communio illa " cedat, opperiendum eſt ut conjux emoriatur & penitus fato defunctus " ſit, ſed confeſtim ut mori incipit poteſtas illa Legitima (vulgo *Lawful* " *power*) deſinit, & communio effectum ſortiri incipit. Mortuus vero in- " cipit, imo civiliter, pro mortuo habetur, poſtquam morbus invaſit Le- " thalis & ſonticus, qui cuique rei agendæ impedimento ſit; adeo ut " nec domo proreptare poſſit, nec negotiis (uti ſolitus erat) ſupereſſe, " eundo ad Templum aut Forum & loca publica ubi plerumque ſalus " animæ & negotio procuratur: quamdiu enim animus Ergaſtulo cor- " poris coercetur & ejus Miniſterio & organis neceſſario utitur, vix fe- " ri poteſt ut corpori ægro mens ſana ſit. Accedit, Quod ubi Cadaver " ibi aquilæ, & moribundis adſunt & advolant plerumque (amicis ut " videri volunt ſed) corvi & hæredipetæ, ut captent & obſidiangus ali- " quid; nec id difficile eſt: Ægri ſiquidem tam corpore quam animo " in-

" licet ex morbo non decumbat hostis, magis periculoso,
" dicitur esse Lecto ægritudinis, & in eo testamentum facere; & alienatione
" Terrarum aut rei alicujus hæreditariæ ex pactis introducitur. Et si
" fetus faxit aut alienaris bonorum administris infamiæ facile fue-
" currit; Sed non sine summa ratione prospectum est hæredibus, ne
" quid in eorum fraudem fiat a parentibus aut deficientibus in extremis,
" cum sui parum compotes fiant; idque non semel captum Jure veteri,
" quod Libris [illegible] Liberi Jurisconsulti; iis Eloginm
" illud quod Liberi Juris nostri sunt, haud meruere Principes nostri;
" nec immerito, dictum veteri pace viri constantissimi *Cragii* in s
" paulo iniquioris [illegible] rerum ex stercore
" colligit Ennii; [illegible] non tam stercore
" quam Juris nostri veteris [illegible] licet multa
" colligere aurea, &c. [illegible]

" Sed moribus nostris & Jure Fori (cum [illegible]) idem jus introductum est in favorem Vidui & Liberorum; & ut plerumque ubi jus deficit Senatus supremus suplet, instar Prætorum, ita ex æquitate accommodavit remedium utile ne Legitimis suis fraudentur, nec liceat Patri familias in Lecto ægritudinis conjugis aut Liberorum, mobilium partes & Legitimas imminuere, nedum abalienando penitus eripere: quin etiam in Matrefamilias præmoriente, ex commissione ejus Legitima cedit statim ea in Lecto ægritudinis constitutâ; nec ex eo tempore Marito, quam vis Domino & in Legitima potestatè permittitur aliquid facere in fraudem uxoris, aut eorum qui in jus ejus succedunt, multum autem interest, uter vir an uxor præmoriatur; vir enim superstite cum Liberis, ex obitu uxoris cedit communio, & Legitima tantum uxori ejusque proximis & successoribus, iis mobilium triente cum quatuor unciis & partibus decisis: quæ supersunt Bes, *viz.* Ceu octo unciæ & partes adhuc communia sunt Patri & Liberis. Sed ut superius dixi habitu tantum & spe; fieri enim potest & sæpe evenit, ut Communio inanis sit, Liberis Patri præmorientibus, vel Patrimonio accisso, vel aliquo casu defecto; tibi autem viro contingit infata concedere, uxore & liberis relictis, communio cedit ad omnes effectus tam uxori quam liberis; adeo ut ex mobilibus triens uxori, alter triens accedat liberis, tertius Patri-familias relinquitur, de eo, nec ultra, testari potest si voluerit: si intestatus decesserit, suum trientem liberis relinquit adinstar hæreditatis adeundum Jure quasi hæreditario, sed hærede submoto & excluso: Liberi enim trientem Patris haud vindicant ut suum & Legitimam, sed in eum succedunt, quasi hæredes in mobilibus modo solenni; & hæredi legibus satis superque consultum est, cum solus hæres sit ex asse in immobilibus, reliquis liberis præteritis & exclusis: Sin hæres e re suâ esse duxerit, hæreditate omissa, inter liberos admitti & ex Patrimonio paterno sive hæreditate & terris, sive mobilibus, æquo cum cæteris nec ampliorir Jure aut parte. Potiris id ei facile permittitur; unicuique enim licet renunciare Juri pro se introducto: nec minus hæres hæreditatem adit, & in Terris (si quæ sunt) investiendus est, ut rerum hæreditariarum Jus adeptus, fratribus habili modo eas conferre & impertire possit. sic collatione facta, defuncti Patrimonium, quod ad hæredem vel ad liberos ut liberos, aut Executores, aut proximos cognatos pertineret, ab intestato ultra citraque inter hæredem & liberos communicatur. Testamento autem facto si ex liberis aliquis vel Executor vel Legatarius sit, quod ex Testamento consequitur haud tenetur *conferre*; nec enim id

" habeo ut legitimam (& nec disponendi potestatem vetat quidem) liberis
" statoris voluntate & ut quidem, verum cum penes hæredem
" mature & re integra debet eligere; si enim hæreditatem adeat pure, nec
" testatus se velle conferre, nec postea auditur nec ad collationem ad-
" mittitur, elegit enim nec eligenti licet variare.

" His altius positis & præmissis, uti par erat in materia usu quidem &
" moribus satis obvia, sed (quod sciam) in libris non satis enucleata, ex
" iis eliciendum, Quid Juris sit in ista specie facti.

" Diem obiit *Sempronius* sed intestatus, *Mevia* uxore superstite cum
" tribus liberis *Caio, Titio, & Publio*; Viduæ triens mobilium jure relictæ
" (ut loquimur,) *Titio* & *Publio* alteri triens cesserat ut Legitima & liberis,
" tertius etiam triens iis obtigit sed ut executoribus & quasi hæredibus mo-
" bilium ab intestato; adierant etiam dati a Judicibus ad quos pertinet Te-
" stamentorum probatio & Executorum datio; sed *Caius* primogenitus cui
" delata erat hæreditas, decessit, hæreditate haud adita, eo forte peregre pro-
" fecto aut aliter impedito; ejus morte ea ad *Titium* secundogenitum de-
" venit & adita est: Contra *Titium* agebat *Publius* frater, condictione ex
" causa, ut restitueret quæ ex mobilibus, vel ut Executor, vel unus ex li-
" beris nactus fuerat; cum res ad alium casum devenerat & eum a quo non
" potuisset incipere; quod ea habuerit causam & unicam fuisse quod hæ-
" res non fuerat sed unus ex liberis, & cum eo effectum evanuisse; eum
" nunc hæredem & integrâ & opimâ hæreditate locupletatum, eâ debere
" esse contentum; nec sine injuria aut invidia ex mobilibus aliquid libare
" aut retinere posse: & in Libro isto cujus mentio superius facta, vetus re-
" peritur Decisio. 1553. *Julii*, quâ contra hæredem Judicatum in causa
" *Alexandri Law* contra *Robertum Law*.

" Sed cum ista ex libris Curiæ & Regestis Decisio haud promatur, sed
" ex compilatoris nescio cujus libro & notis, salvâ rerum Judicatarum Au-
" thoritate quæ apud me magna est, integrum mihi esse reor ut in contrari-
" am sententiam pronior sim, iis adductus argumentis: Cessit siquidem
" Legitima liberorum ejusque semis ad *Titium* pertinens, confestim a
" morte Patris; cedere autem tum Legitima tum Legatum dicitur cum
" actio pro iis competit; & ii, quibus Jus cessit, si decesserint antequam
" res ab eo sibi debitas consequantur, Jus tamen & actionem ad hæredes
" transmittunt. Ea autem est definitio Juris consummati & perfecte
" quæsiti: Jus igitur, *Titio* ita quæsitum & in eo quasi fixum, quomo-
" do avelli & ei eripi queat haud video: alia quidem est ratio defuncti
" (ut loquuntur) partis ceu trientis, ejus semis ad *Titium* pertinebat ut
" unum ex proximis cognatis & executoribus; is a morte *Sempronii*
" statim *Titio* delatus est: haud cessit tamen ex eo tempore sed tunc de-
" mum cum *Titius* adiit, & Patri Executor datus est: Jura enim hæredi-
" taria, vel quasi, quæ pertinent ad aliquem ut hæredem & successorem in
" alterius Jus universum, non cedunt nec quæruntur nisi hæreditate adita;
" in mobilibus autem Executoris datio & confirmatio est instar additionis:
" utcunque enim suppositum sit *Titium* Executorem datum a judice, de-
" functi triens cessit Executoribus & istius semis *Titio*, Jus adeo firmum
" & ad hæredes transiturum, si *Titius Caio* præmortuus fuisset, morte *Cai*
" intercidere & irritum fieri, & Jure & Ratione videtur alienum. Ad
" hæc, mortuo Patre-familias, cum de patrimonio quæritur, an integrum
" & ex asse ad eum pertinuerit cælibem forte & orbum, an vero commune
" fuerit uxori & liberis; & quota uxoris & liberorum pars sit, utrum se-
" mis an triens; & liberorum Legitima an ex asse unius sit; an si plures
" sint liberi in quot uncias & partes dividenda sit. Tempus mortis Patris-
" familias inspicit Lex, de futuro haud solicita, nec quæ tunc sunt quotæ
" augeri aut minui possunt; quamvis patrimonium rerum quæ in eo sunt

« [illegible] Romanus, Po-
« ſito [illegible] viduæ & liberis;
« vidua[illegible] [illegible] alio caſu ex-
« tinctis, [illegible] trientem tan-
« tum, [illegible] confirmationis nec liberi
« nec vidua [illegible] Teſtatoris, & tunc
« partes fecer[illegible] [illegible] morte haud evane-
« cunt, ſed ad [illegible] [illegible] acquirebat. Poſtro eti-
« am Patrem fa[illegible] [illegible] & unicæ tantum filiæ
« præter hæredi[illegible] [illegible]; filiam autem ſecundo ge-
« nitum impe[illegible] [illegible]; ſuo caſu, ex patris
« mobilibus, h[illegible] [illegible] fratris, & ejus
« Legitimam; ne[illegible] [illegible] ſuo trientibus
« ſemiſſes petant, [illegible] ad alium [illegible] hæredem
« ex mobilibus [illegible] [illegible] in iſto caſu
« hæredem ex [illegible] [illegible] & jure ſuo;
« ſed mediate & jure [illegible] [illegible] ſpecie autem fa-
« cti de qua agitur, *Titium* tum [illegible] tum unum ex liberis;
« & ſuo jure hæreditatem patris adiiſſe, nec minus ut unum ex liberis;
« Legitimæ liberorum ſemiſſem adeptum: Jura iſta, *devolvenda*, nec pe-
« nes unum conſiſtere aut retineri poſſe. Illud facile diluitur; tempus enim
« mortis *Sempronii* Patris-familias intuendum; eo autem tempore *Titius* e-
« rat unus ex liberis, nec hæres erat aut eſſe poterat, *Caio* primogenito ſu-
« perſtite; ei hæreditas morte patris delata, ad *Titium* haud immediate,
« ſed ex fratris morte pervenit; *Titio* quaſi per ſurrogationem & *ἐπανα-*
« *βασιν* in locum primogeniti ſubeunte. Cum igitur *Titius*, eo quo Pater
« obiit momento, inter liberos fuerit, & ipſo jure Legitimam nactus eſt,
« nec injuriâ retinet quod jure habuit. Si *Caius* patris adiiſſet hæredita-
« tem, ei *Titius* hæres foret, nec minus patris hæreditate potitus retine-
« ret. Quod autem *Caius* haud adierit, *Titio* nec imputandum nec offi-
« cit. Patrimoniorum, ſiquidem conditio, & Jura viduæ & liberorum,
« legibus conſtituuntur: nec æquum eſt ea ex arbitrio hæredis pendere
« aut ambulare. Porro hæreditatis delatio & facultas adeundi, aliis caſi-
« bus nedum hoc, haud parum operatur: hæredem enim perduelli & Ma-
« jeſtatis reo, hæreditas etiam non adita amittitur, & fiſco quæritur.

S. The Author gives an Account here of the Succeſſion of the Heir with us in the Heritage or Heritables; and of the Succeſſion of the Relict and Bairns; and of the neareſt of Kin beſide the Heir, in Moveables. But as to Moveables, he ſuppoſes, without Ground, That there is a Communion of them betwixt the Husband *and* the Wife *and* the Bairns, during the Marriage; but ſuch as is only *habitu & ſpe*, until the Marriage diſſolve; and that then it takes Effect.

But the truer Account in Law, is, That *eſt quidem communio bonorum inter maritum & uxorem; & ea nititur pari mobilium quæ uxori aut relictæ obvenit, matrimonio morte diſſoluto: ſed liberorum legitima provenit ex eorum naturali ſucceſſione: Et legitima appellatur, quod pater, teſtamento aut legatis minuere non poteſt; ſed quaſi falcidia, legibus iis reſervatur: Sin pater moriens, partem etiam ſuam, ut aiunt, liberam relinquit, eodem jure ad liberos devolvitur: Ea in hoc tantum differt a legitima, quod liberam hanc, leve præſtat liberis, cum illam, pater pro libitu onerare aut exhauriri poteſt. Hinc patet error noſtræ praxeos, quæ legitimam ad liberos transfert, tanquam ad hæredes ſuos, ſine aditione: Defuncti autem partem non ſine confirmatione, quæ in mobilibus pro aditione habetur: Quod non tantum abſurdum, ſed iniquum; cum inde ſæpe accidat, quod pluribus libe-*

rit relictus, legitimam
ante confirmationem, suam
decessit, sed fratribus

The Author says well, That
sickens her Share of the Com
prejudge her Successor there
maining *Bes*, or Two Thirds of
ther; *the Author says*, by vertue of
Children. But really they
perty, as they ever were. 'Tis true,
the free Moveables come to be
and the Defunct: But how this happens, is above discussed.

What the Author hath further here against a Man's
Death-bed, to the Prejudice of
by the Act of Parliament
that if the Disponer live
is sufficient to elide the Exception of Death-bed. The Author fu
how the Heir may abandon the Heretage, and upon collating,
with Executor. And also Remarks well, That what the Defunct
to any of his Children, is not lyable to be collated, but is enjoyed
præcipui.

The Author states also a Case, *Sempronius dies intestat*, leaving a Wife
and Three Sons, and the Wife gets her Third, and the Two younger Chil-
dren their Third; and further, the Defunct's Third left free, falls to
them as neareſt of Kin: But the eldeſt Son and apparent Heir comes to
die without Entering, and, it may be, Abroad; ſo that the Succeſſion
falls to the next. Thence the Queſtion is moved, *If the youngeſt may in*
this Event make his ſucceeding Brother, reſtore to him his Part of the
Moveables? And the Author marks, That in *July* 1553, it was decided
againſt the Heir. As to which, he reaſons at great Length, That, by
Sempronius's Death the *Legitime* fell to the Two younger Brothers *ipſo*
jure; and if they confirmed the Deed's Part, the ſame alſo fell to them
by that Quaſi-Adition; whence he concludes, That the ſecond Brother
having thus a *jus quæſitum*, his Succeeding in the place of the eldeſt to
the Heritage, ſhould not ſubject him to reſtore his part of the Move-
ables. And he reaſons juſtly, That the Succeſſion ſhould be ſtated upon
the Death of *Sempronius*. And thus, if *Sempronius* had died, leaving a
Wife and one Son only, beſide the Heir; if this ſecond Son ſhould die
without Iſſue, the eldeſt Son and Heir would ſucceed to him as his Exe-
cutor; and neither the Relict nor Executor of *Sempronius*'s could in this
Caſe crave the Half for their Third. But in this only the Author's Rea-
ſoning may ſeem to fail, That *eſto* the Succeſſion be to be ſtated as it
falls by *Sempronius*'s Death, yet if his eldeſt Son and apparent Heir does
not enter, then the ſecond Son comes in his Place, and ſucceeds as if he
had been apparent Heir at *Sempronius*'s Death. In which Caſe, it is cer-
tain, he would have had no Share in the Moveables; and therefore his
Succeſſion in Heretage being thus drawn back, ſhould make that Part of
the Moveables which he preoccupied, fall to the youngeſt Brother:
Whereas, in the Caſe of *Sempronius* dying, and leaving only Two Sons,
the Eldeſt ſucceeds rightly as Heir; and then if his younger Brother de-
ceaſe without Iſſue, he ſucceeds as juſtly in his Part of the Moveables:
Becauſe, here the Succeſſion is ſtated on different Events. But the
whole Debate, is more an Argument for Exerciſe, than of any Con-
ſequence.

Legitimation per ſubſequens Matrimonium.

M. A Perſon after his firſt Marriage, of which he had Children, having married again, and having diverſe Children by the Woman married to him in that Second Marriage, elder than the firſt Children, which are thereby legitimate: *Quæritur*, Whether the eldeſt Son with the Second Wife, will be preferred to the Son of the firſt Marriage, as to the Right of Succeſſion? *Ratio Dubitandi*, The firſt Marriage, was contracted *Spe*, and in Contemplation that the Children of that Marriage would ſucceed, and the eldeſt Son by his Birth had *Jus primogenituræ*, as the firſt lawful Son, which could not thereafter be taken from him: *& e contra*, the Son of the ſecond Marriage, the Time of the Father's Death, which is to be conſidered as to the Queſtion of the Succeſſion, is his eldeſt lawful Son.

S. This is a known Caſe. But tho' Marriage do, and ſhould legitimate, yet, to draw it back, where there is ſuch a mid-Impediment, *ſemper mihi durum viſum eſt*. But for certain, the Children of the firſt Marriage, ſhould have the Benefit of their Mother's Contract.

N. If a Perſon may marry on Death-bed, in Order to the Legitimation of Natural Children, in Prejudice of his Agnats, who would otherways ſucceed?

S. We met with this Queſtion before. And I ſtill think, not.

Marriage and Legitimation.

N. THERE being a Declarator intented, to hear and ſee it found, that the Children were lawful; in reſpect there was a Promiſe and *Copula*; *Quæritur*, If the Purſuit, being after the Father's Deceaſe, in order to the Succeſſion to the Good-ſire, the Promiſe may be proven *pro tanto de Jure*, as it might have been before? My Lord *Newtoun* informs, that after the Father's Deceaſe it is found not probable by Witneſſes.

S. Suppoſe a Man hath Children out of Marriage, his Father being ſtill on Life; albeit he may be allowed to marry the Mother, and thereby legitimate the Children, yet, if the Mother were dead, and the Children ſhould raiſe a Declarator upon the foreſaid Ground of an antecedent Promiſe, 'tis thought, it ſhould not be allowed even by the Father's Oath, much leſs by Witneſſes to ſet up apparent Heirs to the Grandfather: For, here it is clearly his Intereſt, and cannot in Reaſon be ſubjected to ſuch a Hazard, whatever the Effect may be as to the *Father's* Succeſſion. In which Caſe, nevertheleſs, I would ſtill think a Probation by Witneſſes a great Hardſhip! For, there can be no Law nor Reaſon, that Witneſſes, who, with us, cannot prove above a Hundred Pounds *Scots*, ſhould make Heirs to a Man in his *univerſum jus*.

Leuteratio.

S. THis and the following Titles, *Libellorum Contradictæ*, and *Liberi*, are but Latin Citations.

Liferenter.

N. IF a Liferenter of Lands, Stock and Teind, having ſet the Lands to Tenents, for a Duty for the Stock, and drawing the Teind, and having deceaſed before *Martinmaſs*, after drawing the Teind: *Queritur*, Will ſhe be lyable to the Heir for the Half of the Teind? *Ratio Dubitandi.* For the Heir, That ſhe dying before *Martinmaſs*, he ought to have the Half of that Year's Duty: And for the Liferenter, that ſhe had Right to the Teind after it was ſeparate and collected, ſo that ſhe might have diſpoſed of it; and having gotten it, it cannot be taken from her; and that the Legal Terms are to be conſidered in the Caſe of Debt, when *dies cedit*; but in this caſe *nihil debitur*, but ſhe has Right to the Fruits, Teinds, and *Quota* of them in the ſame Manner as the Tenent, and as if ſhe had laboured, *Vide Third and Teind. Letter* T. *Vide Tutelar. Litera* T. *q.* 2. *Vide Milns. Litera* M.

S. IT is known, That if the Lands and Teinds had been ſet for Duty, the Liferenter deceaſing before *Martinmaſs*, would only get the Half of that Year's Duty: But ſeing the Liferenter might have taken the whole Lands in her own Hand, and ſo dying, tho' before *Martinmaſs*, had got the whole Cropt, ſhe ſeems to be in the ſame Caſe for the Teind drawn and ſeparate before *Martinmaſs*.

N. WHERE Graſs-Rooms are ſet for Payment of a Silver-Duty (by the Tenent entering at *Whitſunday*) the Half at *Martinmaſs*, and the other Half at *Whitſunday* thereafter: *Queritur*, If the Liferenter deceaſe after *Martinmaſs*, whether the *Martinmaſs* Duty will belong to her Executor? *Ratio Dubitandi*, That the Duty payable by the Tenent, entering as ſaid is, and going away at the next *Whitſunday*, is payable in reſpect of the Cropt, and *proventus* of the next Year, either of Corns or *fœtura animalium*: And it is without Queſtion, that a Tenent paying a Silver-Duty for a Corn-Room, albeit he pay at *Martinmaſs* after his Entry, yet it is payed for the next Year's Cropt; ſo that the Liferenter can pretend to no Part thereof, deceaſing the Time foreſaid. And on the other Part, it appears that there may be a Difference as to Graſs-Rooms, ſeeing the Half of the Duty ſeems to be payed for the Profite of the Graſs, from *Whitſunday* to *Martinmaſs*, which falls within the Liferenter's Right.

S. I ſhould make no queſtion, that this *Martinmaſs*-Duty would belong to the Liferenter's Executor, but ſhould rather put the Queſtion, If the whole Year, that is, both for the *Whitſunday* and *Martinmaſs*, ſhould not fall to her Executor; ſhe dying after *Martinmaſs*, as it would certainly happen in Corn-Rooms: And *Whitſunday* and *Martinmaſs* being accounted the legal Terms for the whole Year, ſpecially if ſhe enter

ter to her Liferent before the [illegible] after the *Whitſunday*, and died after the next *Mart[illegible]* Year or the *Martinmaſs*-Term, may be judged ſuffi[illegible] beſt Rule for all theſe Q[illegible] *in diem*, and give the Life[illegible]r the Year's Duty in Whole or in [illegible] as it falls after her Ent[illegible] the ſame may [illegible]

N. Quæritur, Quid Juris, As to Salt-Pans and Milns if the Liferenter have the ſame in her own Hand: Whether her Right is preſently determined by her Death?

The ſame being ſet to Tenents from *Candlemaſs* to *Candlemaſs*: If the Liferenter deceaſed after *Lambaſs* and *Martinmaſs*: Will her Executors have any Part of the Duty after *Lambaſs*?

S. If a Liferenter have Salt-Pans and Milns; or, it may be, Coal-heughs in her own Hand; her Right, as I would [illegible] is determined by her Death. But if theſe Pans or Milns were ſet [illegible] Tenents from *Candlemaſs* to *Candlemaſs*, and the Liferenter deceaſe after *Lambaſs*; her Executor ſhould have the *Lambaſs*-Duty. And tho' ſhe died after the *Martinmaſs*; yet if before the *Candlemaſs*, ſhe ſhould only have the Half of the Year. For here in this Caſe, Why ſhould not *Candlemaſs* and *Lambaſs* be in Stead of *Whitſunday* and *Martinmaſs*; unleſs there were a poſitive Law, That *Whitſunday* and *Martinmaſs* ſhould divide the Year; as the legal Terms, whatever the Conventional Terms may be?

N. When Rentals are ſet in theſe Terms, That beſide the Rental-Duty, there ſhould be every Five Years a conſiderable Sum payed, as *in Contractu Libellario: Quæritur*, If the Liferenter will have Right to that Sum, if it fall to be payed during the Liferent?

S. If this Sum ſhould fall to be payed within the Liferenter's Right to that Rental; there appears no Reaſon why it ſhould not be payed to her.

N. When the whole Eſtate of a Nobleman is diſponed, reſerving his Liferent; or of a Baron: Will the Liferenter have Vote in Parliament, and Voice in the Election of Commiſſioners for Shires?

S. When a Baron diſpones his Eſtate, reſerving his Liferent, he has ſtill his Vote in the Elections of Commiſſioners for Shires; and ſo may be alſo choſen, and have Vote in Parliament: For the Act 1681 concerning the Election of Commiſſioners for Shires, gives the Liferenters Vote, if they pleaſe: Otherwiſe the Fiar hath it. But both Fiar and Liferenter cannot vote.

N. A Lady being infeft upon her Contract of Marriage in Lands for her Liferent: *Quæritur*, If Tacks ſet thereafter by her Husband will bind her? *Vide Terce, quæſt. ultima.*

S. Tacks ſet by a Husband of theſe Lands wherein his Wife is infeft for her Liferent, will not bind her; in reſpect her Right is anterior: And ſhe is not in this Caſe as a ſingular Succeſſor, againſt whom the Act of Parliament makes Tacks real. But if the ſingular Succeſſor's Right be anterior, Is it not the ſame Caſe?

Executors of a Liferenter.

N. IF a Woman deceaſe after *Whitſunday* before her Husband; Will her Executors have Right to a Part of the Year's Farms?

S. SEEING the *Whitſunday*'s Duty is fallen due and moveable, it appears that ſhe muſt have her Part thereof, as of other Moveables.

Liferents.

N. DOES as to Liferents (when the Queſtion is betwixt the Executor of the Fiar and Liferenter) *cedit* at *Whitſunday* and *Martinmaſs* as the Legal Terms.

S. THIS *General* doth not anſwer all Difficulties, as hath been noted in the Title *Leſerenter*.

N. Quæritur, If a Bond be, to a Man and his Wife the longeſt Liver, payable at *Lambmaſs* and *Candlemaſs*; and the Husband deceaſing after *Candlemaſs*, will the Husband's Relict have Right to a Half Year at *Whitſunday*?

S. THE Relict in this Caſe, will not have Right to the next Half Year, tho' ſhe ſurvive the *Whitſunday*, unleſs ſhe ſurvive the *Lambmaſs* alſo; for theſe appear to be *here* the legal Terms.

N. IF a Father be Infeft in Liferent in Lands, and be content to renounce his Liferent in Favours of his Son? *Quæritur*, If it be *habilis modus* to extinguiſh his Liferent? *Ratio Dubitandi*, He is the Superiors Vaſſal during his Life, and cannot ceaſe to be Vaſſal without the Superiors conſent, at leaſt *ſine refutatione*.

S. WHETHER the Son be infeft baſe, holding of the Father, with the Reſervation of his own Liferent, or, holding of the Superior with the ſame Reſervation: It may well be thought, That the Father's Renounciation extinguiſhes the Liferent, which is but as a Servitude, and ſo eaſily renounced in Favours of the Fiar. Yet ſtill the Superiority, if in the Father's Perſon, muſt remain until it be otherways ſettled.

N. WHEN a Vaſſal is Year and Day at the Horn, if he has granted a Right to be holden of himſelf, what will be the Import of his Liferent?

S. IF the Right was granted *after* Denounciation, it will not prejudge the Superior, as to the Liferent Eſcheat: But if the Right was granted *before* Denunciation, and the ſame be cled with Poſſeſſion within Year and Day thereafter, it will prejudge the Liferent Eſcheat.

N. IF a Liferenter do diſpone his Liferent of Lands; or if the ſame be compriſed from him, and thereafter he be Year and Day at the Horn: *Quæritur*, If the Superior will have Right to the Liferent, as if the ſaid

Right

Right had not been granted? ANSWER, It is thought, he can have no other Right, than such as the Liferenter had, and affected with the said Right.

IF the Liferenter be forfaulted, will not the King have the Right of the said Liferent, without the Burden of the said Rights? And if it be so, *Quæ Ratio Discriminis?* ANSWER, The King will have Right to the said Liferent entire; and the Reason of the Difference is, That Treason is *Crimen feudale*; and when the Vassal, Fiar or Liferenter doth Forfault the Right cometh to the King *Pure*, and without any Burden but such as he has consented to: Whereas Horning is not *Delictum feudale*, but *commune*: And the Liferent doth not belong to the Superior *Jure feudali*, but *Statuto*; so that he ought not to be in better Case than the Rebel.

S. THE Superior will have Right to this Liferent, if not disponed or comprised before Denunciation, and cled with Possession before the Year and Day. But if comprised after Denunciation, if for a Debt prior to the Comprising before the running of Year and Day, the Comprising will carry it.

IF the Liferenter be forfaulted, the King will have the Right of the said Liferent free and entire: But if this Liferent may be assigned, and the Assignation totally denuded, it does not appear how the Cedent forfaulting can prejudge the Assigny. But the Author Reasons, *That Treason is* Crimen feudale; *and when the Vassal or Liferenter doth forfault, their Right cometh to the King*, pure, *without any Burden not consented to.* And this Reason may have Place, if the Liferenter were not totally denuded; But if an Assignation or Disposition do denude him totally, the Reason fails.

Quando dies cedit *as to Liferenters.*

N. WHEN Rent of Lands is Victual, the Heretor dying before *Whitsunday*, the Liferenter has Right to the whole Year; if after *Whitsunday*, but before *Martinmass*, The Relict has Right to the Half; but if after *Martinmass*, to no Part; because *Whitsunday* and *Martinmass* are *Termini Legales* as to the Question, *Quando dies cedit. Quæritur*, therefore, Whether when Rent is all in Highland Rooms & *agris pascuis*, the Custom being in some Places, that the Tenents entering at *Whitsunday*, pays the Half of the Rent at *Martinmass* next, and the other Half at *Whitsunday* thereafter; *Quid Juris* as to the Relict, the Husband dying after *Whitsunday* or after *Martinmass*?

THE same Question is, If, in the Lowlands in Corn-Rooms, the Tenent and Master agree, that the Duty should be payed in Money by the Tenent entering at *Whitsunday*, the Half at *Martinmass*, and the other Half at *Whitsunday*?

S. *It is thought*, the Case must still be the same, according to the Liferenter's Entry; for, if before *Whitsunday*, she must have that Term either by one or other; and if *after*, but before *Martinmass*, she must have that Term also; at least, she must have the whole or half Year, according to her Entry.

Vassals Heirs.

Substitution of Heirs.

N. LANDS being disponed to a Person, and the Heirs Male descending of him; which failzieing, to the Granter and his Heirs, *Quæritur*, If his Foresaids fail, what Way will the Granter, being Superior, and his Heirs, attain to the Right, whether as Heir of Provision to the Vassal? or *per viam Consolidationis*, and by a Declarator that [illegible] Right by the Retour foresaid; and that [illegible] Property is consolidate with the Superiority?

WHETHER he will be lyable to the Vassals Debts? *Ratio Dubitandi*, The Vassal was Fiar and might contract Debt, and whoever succeedeth to him ought to be lyable thereto.

S. WHEN Lands are disponed to a Person, and the Heirs-Male of his Body, which failzieing, to the Granter and his Heirs, if the Substitution take Place; the Granter being still Superior, he or his Heirs must be Heir of Provision to the Receiver of the Disposition: And in their Service as such, the Retour will bear the Holding, which in Effect is a Consolidation, and the Retour may express it, tho' it be not ordinary Stile. And further, If the Granter and his Heirs be still infeft in the Superiority, they may infeft themselves. But, in good Law, the Registering of the Retour in the Register of Sasines, bearing the Consolidation should serve for all. However, these Substitutes will be lyable to Debts, as Heirs of Provision.

N. IF a Right be granted to a Person, and the Heirs of his Body, without any further Provision, or Mention of Return, whether will the King have Right as *ultimus hæres*, or the Superior? ANSWER, The Fee not being simple but limited, it is thought, That the Superior should have Right, seing the Fee is limited. And the King cannot succeed by Way of Representation, and as *hæres ultimus*; and there can be no Transmission beyond the Limitation. But if the Lands be given to a Man and his Heirs whatsomever, the Fee is simple; and the Granter having simply and absolutely given away the same, he can pretend no Right to the same; and the King cometh under the Generality of *Heirs whatsomever*, being *ultimus hæres*.

S. WHEN a Right is granted to a Person, and the Heirs of his Body, without more, those Heirs failing, the Right returns to the Superior, this being a limited Fee. But if the Lands be, to the Man and his Heirs whatsomever; all these failling, the King is *ultimus hæres*. *This the Author judges*, because the Fee is simple. But may not the Fee be said to be limited to the Man's Heirs whatsomever? And seing these are by the Law defined upon their Failzie, should it not return to the Superior, because of the Limitation? For it is but *gratis dictum*, to alledge, That Heirs whatsomever, includes the King as *ultimus hæres*: For, certainly this was not in-

intended by the Parties, but to the Prejudice would run. But then, it is ſtill a Queſtion, *If in the firſt Caſe of the Fee limited to the Receiver and the Heirs of his Body, the Superior upon the Return, ſhould be lyable to the Receiver's Debts?* For, no doubt, the Receiver had the Fee, and might freely diſpoſe thereon; and it might alſo be adjudged from him for Debt: And therefore it were hard, That upon this Return, by way of Subſtitution, the Creditors ſhould be diſappointed. And all that can be ſaid is, That in the expreſs Subſtitution, the Superior ſubſtitute would be lyable; but that in this tacite Return, the ſame is *jure feudali*, through the failing of the Right, and not by Way of Succeſſion.

Litiſconteſtation.

N. IF Removings, Spuilzies and Ejections, which are *interdicta poſſeſſoria Litiſconteſtatione perpetuentur* for Forty Years, or only Three?

THE ſame Queſtion may be for Servants Fees, Houſe-Mails, and ſuch other Actions which preſcribe in Three Years.

S. Removings, Spulzies, Ejections, and Actions for *Servants Fees* and *Houſe Mails*, and ſuch other as preſcribe in Three Years, are certainly prorogate by *Litiſconteſtation*. But yet ſo as this is alſo determined by the late Acts of Parliament anent *Preſcription* and *Interruption*. See the Acts.

Quo caſu Poſſeſſor in mala fide conſtituitur per Litiſconteſtationem & quando non?

N. LItiſconteſtatio poſſeſſorem malæ fidei conſtituit, adeo ut ab eo Tempore ad reſtitutionem fructuum tenetur: hoc tamen verum eſt in iis, qui per Litiſconteſtationem vere in mala fide conſtituuntur, velati ſi res feudalis Emphyteutica petatur, aut vindicetur, ob feloniam commiſſam: aut quia tempus locationis tranſactum eſt veraque ſit cauſa vindicationis, quam etiam poſſeſſor nec minus obſtinate contendit.

Secus eſt, ſi ego rem emo ab eo cujus eſſe putabam, tu vero dicis eam ad te pertinere, & nihil adducis præter petitionem & nunciationem, tunc quia bonam fidem habeo, Litiſconteſtatio me non vera ſed ficta efficit malæ fidei poſſeſſorem; & a fructibus merito excuſor, donec ſententia feratur. Theſ. Behold. in litera C. 48. *verb.* Kriegsbeweſtigung. Sect, pen. P. 478.

S. THIS is a *probable* Rule, But there is no general, certain Rule, in this Caſe, which ſeems to depend upon the Merit, *that is*, the true Import and Weight of the Cauſe.

Locus Pœnitentiæ.

AFTER Articles of Agreement are ſubſcribed, of which, one is, That they ſhall be extended in a Contract. *Quæritur*, If there be *Locus*

pœni-

An Agreement being to be perfected in Writ, wherein one of the Parties was to be obliged to pay a Sum of Money; there was [illegible] thereafter by that Person, desiring that the Writ may be [illegible] ing, That he should perform conform to the said Agreement. [illegible] If he be bound by the said Letter, so that there is no *Locus* [illegible]? Answer. It is thought, That the Bargain being to be perfected in Writ, and until then, there being *Locus pœnitentiæ*; the Letter promising Performance, doth imply a Condition, *viz.* if the Writ be perfected and subscribed: Seing, upon the drawing of Writs there may arise Questions, which may hinder the perfecting of the same, & *multa cadunt inter calicem*, &c.

S. We commonly hold, That a Bargain being reduced to *Writing*, tho' only by a subscribed Minute, there is no *Locus pœnitentiæ*. But when an Agreement is to be perfected in Writing, wherein one of the Parties is to be obliged to pay a certain Sum, tho' that Party should thereafter writ a Letter to the other, desiring the Writing to be drawn, for that he would perform as agreed: Yet this Letter would not bind; for there is *Locus pœnitentiæ* until the Writ be mutually perfected.

M.

Marriage.

N. IF the Superior infeft, the apparent Heir being unmarried, doth he pass from the Marriage?

S. Tho' a Superior of Ward Lands, infeft the apparent Heir being unmarried, he doth not pass the Marriage. But if he should infeft him before *Fourteen*, when the Marriage falls due, there might be a greater Question.

N. If Marriage be due, if the apparent Heir be either *senex* or valetudinary? And either unfit or unwilling to marry?

It seemeth *Celibate* is not *Delictum*, so that the Casuality thereby should arise to the Superior; but only the Marrying without the Superior's Consent, inferreth Contempt, and consequently *Delictum & Penam?*

S. Tho' the apparent Heir be *senex* or valitudinary, and tho' unfit or unwilling to marry, yet we find the Marriage due to the Superior as his Casuality, tho' he marry not at all. And if the Vassal marry without his Consent, yet it is the single Avail; but if he marry farder, against his Offer, then it seems to become penal for the double Avail. But, how this *barbarous* Casuality came in, when due, and, how to be prosecuted and ex-

cacied, hath many Speculations, which only more and more discover the the Absurdities thereof.

N. If the apparent Heir be married in his Father's Time, and have Children, and thereafter marry after his Father's Decease, will a Marriage fall to the Superior?

S. Tho' an apparent Heir be married, and have Children, in his Father's Time; yet if he be Widower when his Father dies, 'tis thought his Marriage will fall. But there appears great Reason to *lessen* the Avail, and, since he hath Children and Heirs, even to exclude it.

N. If the Marriage of the apparent Heir of Ward-Lands should be modified, with respect to the Value of the Ward-Lands, without Consideration of his Debts? *It appears* that the Superior should not be in worse Case by the Deed of his Vassal; and yet he may be in better: For if the Heir have beside, a personal or other Estate, the Marriage will be modified to be such, as the Tocher to a Person of that Estate may be thought in Probability to amount to.

S. In modifying the Avail of Marriage, the Vassal's whole Estate, besides the Feu he holds of the Superior, and also all his Debts, fall under Consideration. But the *Exchequer* did set a Rule for modifying the single Avail of Marriage.

N. If a Person holding of the King, and other Superiors *respective*, of the King blanch, but of them Ward; may resign in the King's Hands to be holden Ward *in emulationem*, and of Purpose to prejudge the other Superiors?

S. A Person holding some Lands of the King *blanch*, and others of other Superiors *Ward*, 'tis thought, may resign in the King's Hands for a new Ward-Infeftment, of Purpose to have a more easy Superior: For here, *utitur jure suo*. But this Resignation must be made, before the Marriage fall to the other Superior.

N. If Parties be married publickly: *Quæritur*, If it be notour that they are impotent, as if it may be proven, That before the Marriage the Man was *castratus*: Is it competent to the Heir or any other Person concerned in the Point of Interest (but the Party prejudged) to question or dissolve the Marriage, as null or *dirimendum*, upon that or any other Ground?

S. Where Parties are lawfully married, tho' it be notour that the Man is impotent, as having been *castratus* before Marriage: Yet it may be thought not competent either to the Heir or any other Person, to enquire *ad dirimendum*, if the Parties be content: For such is the *Honour* of Marriage.

M. If a Marriage be unlawful, and either of the Parties be *in bona fide*; which doth legitimate the Children: *Quæritur*, If these Children will succed with other Children of lawful Marriages; at least to their Parents?

if they will succeed to their other Kinsmen? Or, will only import, That they are not *Spuriæ*; and that they have *Plementi factionem?*

S. Tho' a Marriage be unlawful, yet, if either of the Parties be in *bona fide*, it should legitimate the Children. And if once legitimate, they should succeed with the other Children of a lawful Marriage. For the Legitimation should be *ad omnes effectus*; and even to succeed to the other Kinsmen.

N. If a Marriage after Inhibition may be reduced upon that Ground?

S. This must be understood of some lawful *Inhibition to marry*. But if, notwithstanding, the Parties should marry, the Inhibition may *Suspend*, but not *Annul* it, if the Grounds thereof be cleared.

N. What are the *legitima Remedia* to compel Parties to consummate Marriage upon Contracts? Whether they may not only be decerned by the Commissars; but by the Church, under the Pain of Ecclesiastick Censure?

S. Parties contracting to marry, but unwilling to Consummate, may be *decerned* and *charged* for that Effect; and the Party lesed should also be repaired. But as to *Church-Censure*, it seems only to have Place with us, in the Case of *non-Adherence*.

N. Where some Lands hold of the King *Taxt-Ward*, and others hold of him *Simple-Ward*: *Quæritur*, Will he get both the *Simple* Marriage and the *Tax*'t? It is said, That it was decided in the Case of *Invernitie*, for both.

S. This seems scarce possible that the King or his Donatar should get both the Simple Marriage and the Tax't: For the *Tax*'t should include the *Simple*. And 'tis thought the Tax't is only due. For the Tax't is the Stating of the Avail, and leaves no Place to declare another Avail.

N. Marriage being dissolved within Year and Day, Whether may the Gifts and *Jocalia* given *hinc inde*, be repeted? *Item*, Whether will the Gifts given by Friends fall under the Communion? So that the Maxim, *That Marriage, being dissolved within Year and Day, is in the same Condition as to all Intents, as if it had not been*; is only to be understood of *Dos & Donatio propter nuptias*.

S. Marriage dissolving within Year and Day, even the Gifts *hinc inde*; and even by Friends, if insisted for, may be repeted: For all dissolves *retro*.

N. If an old Woman *super annos*, and past the Age of Marriage, being about Threescore Years, shall succeed in the Right of Ward-Lands? Whether Marriage will be due?

Quid Juris, If a Widow, either Man or Woman *inter annos nubiles* shall succeed to Ward-Lands?

S. The

S. The Marriage, in both Caſes will be due. For the Law gives the Superior the Marriage of the apparent Heir, if unmarried at his Succeſſion, without Diſtinction.

N. If a Perſon have only Two Acres, or a mean Intereſt in Ward-Lands; but a very great Intereſt otherwiſe: Whether will his Marriage be conſidered with Reſpect to his whole Eſtate?

S. 'Tis certain, all will be conſidered; but the Modification will be the leſs.

N. Seing the Marriage of apparent Heirs belongs to the eldeſt Superior: *Quæritur*, Who ſhall be thought the eldeſt Superior? Whether the eldeſt as to the Lands, or as to the Vaſſal? And if it be to be conſidered, which of the Lands was Firſt given in Tenendry?

S. It may be thought, That the Lands Firſt given in Tenendry to the apparent Heir's Predeceſſors in Blood, ſhould be conſidered to ſhew his eldeſt Superior.

N. Quid Juris, When a Marriage is fallen, but not declared nor gifted?

S. The Marriage once fallen, is certainly due, tho' neither gifted nor declared: But, *When to be exacted*, is the Queſtion.

N. A Marriage being contracted betwixt a Woman *pubes* and One that is *impubes*: *Quæritur*, If it be a Marriage, at leaſt as to her, ſo that ſhe cannot marry with another in the *Interim*; that he is not *pubes*, *Ratio Dubitandi*. That a Contract being mutual cannot claudicat

S. A Marriage contracted betwixt Two Parties, but One of them under Age for Marriage, is not *properly* a Marriage, but may be held as *ſponſalia*; yet ſo as the Perſon Marriageable may retract and marry another.

N. A Father, by his Daughter's Contract of Marriage, having diſponed to her and the Second Son of the Marriage, and the other Heirs therein mentioned, his Eſtate, under Reverſion, and certain other Conditions: And in ſpecial, if he ſhould ordain a certain Sum to be paid by thoſe who ſhould ſucceed the Eſtate, to his Daughter and her Foreſaids; and the ſaid Contract bearing alſo a Tocher of 5000 *l.* to be paid preſently to the Husband. *Queritur*. If the Marriage be diſſolved within Year and Day without Children, whether the Contract will be ineffectual, as to all Intents, as being *Cauſa data & non ſequuta cum effectu?* Or whether it be as to the Right of the Perſon of the Daughter, either as to the Eſtate, or as to the ſaid Sum, *ipſo facto* void, at leaſt reduceable? And whether ſhe may repet the Tocher from the Husband's Heirs?

S. This is too long a Caſe for all the Queſtion, *viz. If the Marriage diſſolving within Year and Day, will blow up the Contract?* And certainly it will.

N. A Perſon being Heir to his Father in a great Eſtate holden blanch, and having a ſmall Peice of Land holden ward, which he may ſucceed to, as Heir to his Father. *Queritur*, If notwithſtanding he is Heir general, and Heir ſpecial, in the Lands holden blanch; he needs not enter to the ſaid ward Lands, in Order to be free of a Marriage, which would be conſidered with Reſpect to the whole Eſtate? *Ratio Dubitandi.* That being Heir, as ſaid is otherwiſe, he cannot refuſe to be Heir of the ſaid Lands, ANSWER. It is thought, That if he was charged to enter Heir in ſpecial at the Inſtance of a Creditor in ſpecial, he could not renounce: But the Superior cannot urge him to enter; but will have only the Benefit of a Nonentry, ſeeing the ſaid other Lands, and any Intereſt he had as general Heir, are *diſtincta Patrimonia* from ward Lands; and he may own the one without the other.

IF the Superior may affect and evict the ſaid ward Lands by Adjudication, for the Marriage of the apparent Heir, conſidered with Reſpect to his other Eſtate, in Prejudice not only to the apparent Heir, but of any who ſhould thereafter be apparent Heirs? *Ratio Dubitandi.* That the Marriage being but a Caſuality, may exceed more than the Double of the Value of the Lands which is abſurd.

IF the apparent Heir will notwithſtanding be liable to the Marriage, albeit he doth not enter nor renounce to be Heir to theſe Lands? *Ratio Dubitandi.* That *Refutatio* of Vaſſals is not admitted unleſs they ſatisfy the Caſualities already fallen? ANSWER. It is thought, He may renounce, and be free of the Caſualties perſonally, without Prejudice to the Superior to affect the Ground: And the Caſe is different from that of Vaſſals infeft; ſeeing they having accepted the Rights they cannot offer to renounce, unleſs they pay what was formerly due to the Superior, being *fructus Dominii*, whereunto not only the Ground, but they, are liable perſonally, by reaſon of their Right and Poſſeſſion; and it cannot be ſaid that the apparent Heir has either.

S. An apparent Heir to a good Eſtate holden *Blanch*, and a ſmall Parcel of Land holden *Ward*, may indeed ſerve Heir in general to his Predeceſſor, and alſo in ſpecial in the blanch Lands, and may refuſe to enter in the ward Lands: But it will not ſave his Marrirge if once fallen, nor the Avail thereof as to his whole Value, nor the adjudging even of his blanch Lands, as well as the Ward, for Payment of the Avail.

THE Author thinks the apparent Heir will be liable to the Marriage, albeit he neither enter nor renounce, as to the ward Lands; but that if he renounce it frees his Perſon, without Prejudice to the Superior to affect the Ground: But if the Vaſſal be infeft he cannot renounce, but muſt be liable even perſonally to the Caſualities fallen. And as to renouncing before Entry, it ſeems reaſonable that it ſhould free the Vaſſal's Perſon; but it will do no more as to the Caſualities actually fallen.

N. THERE being diverſe Adjudications, of Lands holding ward within Year and Day, but Infeftment only upon one; and that Adjudication whereupon Infeftment is, being before the Debitor's Deceaſe; and therefore ſtoping the Ward, and the reſt after, but within Year and Day of the Firſt Infeftment. *Quæritur.* If the Firſt be ſatisfied by Intromiſſion, may the Superior claim the Ward of the apparent Heir of the Debitor being Minor, in Reſpect the Act of Parliament, *Debitor and Creditor* doth relate only to the Intereſt and Competition of Creditors,

and

and doth not prejudge Superiors of their Right and Caſualities, and the Adjudger Infeft is only Vaſſal, and the other Adjudgers are not Vaſſals, and by them the Superior can have no Caſuality, either of Liferent, Ward, or Marriage.

S. The Act of Parliament 1661, doth indeed relate only to the Intereſt and Competition of the Creditors, yet it makes the Firſt Infeftment, which happened in the Debitor's Life, to ſerve as one Infeftment for all *Pari paſſu*; nor can this Adjudication with the Firſt Infeftment be any way extinguiſhed to the Prejudice of the Reſt *Pari paſſu*. Whence it ſeems to follow, That the Firſt Infeftment in the Debitor's Life ſhould ſtand good for all, and prefer all to the Ward after vaking. It may alſo be inquired, What if the Superior charged, ſhould pay and redeem the Firſt effectual Adjudger? And this it ſeems he could not do after once *charged*, to the Prejudice of any Anterior, for they are all within Year and Day: But that, paying the Firſt effectual Adjudger, he ſhould cut off all Poſterior would ſtill make a Queſtion, for, the Superior paying, comes but in place of the ſame Adjudger. And *'tis thought*, theſe Things need to be farther cleared by our Pratique, ſpecially, What ſhould be the Effect of the Charge, the Superior anſwering it by preſent Payment: And if this doth not the rather make it the Firſt effectual, as if Infeftment had followed on it.

N. When diverſe Lands are holden of the King, ſome in ſimple Ward, and others taxt as to the Ward and Marriage; *Quæritur*, When the Marriage falls, whether the King will have both the ſimple Marriage and the taxt Marriage. Answer, That ſince at one Time there can be but one Marriage, albeit there be diverſe Lands holden Ward of him ſimple Ward; ſo in the Caſe foreſaid, where there are ſome taxt, he cannot have Two Marriages: And the Taxt being only *æſtimatio*, where there can be no Taxt due. The ſame Queſtion may be of Lands holden ſimple, and Taxt Ward of a Subject.

S. It is already reſolved, (for we had the Queſtion before in this ſame Title) That ſeing one Marriage only falls, the Taxt made, ſhould be its full Avail.

N. A Perſon being charged with Precepts out of the Chancery, to enter a Perſon preſented upon Forfaulture; and in reſpect of his Contumacy, the Perſon preſented being infeft upon a Precept out of the Chancery, and thereafter deceaſing: *Quæritur*, The Lands holding Ward, whether the Marriage of the apparent Heir will belong to the King or to the Superior, *Ratio Dubitandi*? That the Superior not having owned the Defunct to be his Vaſſal, he cannot claim the Marriage of his Heir. And on the other Part, the King is not Superior, and grants only Infeftment *in ſubſidium*, and doth what the Superior without Reaſon, refuſed to do. And there is a Difference betwixt the Caſe foreſaid, and that, when the Superior not being infeft himſelf, is therefore charged to enter with Certification to loſe the Superiority during his Life: Becauſe, in the firſt Caſe, there is no Contempt of the Superior, but a Wrong done to the Perſon who would enter, being a Stranger to the Superior, not being formerly his Vaſſal. And in the other Caſe, there is both a Wrong to his own Vaſſal, and a Contempt of his own Superior, that he is in Nonentry; and the more aggravated, That being charged to enter, he continues in

[illegible] therefore provided that he should lose the Superiority.

S. When a Superior is charged to enter a Donatar upon Forfaulture, and the Donatar, in reſpect of the Superior's Contumacy, is infeft by Precept out of the Chancery, the Marriage of his Heir, in the Author's Opinion, will fall to the Superior refuſing, and not to the King who infeft only *in ſubſidium*. 'Tis true, when the Superior not infeft, is charged to enter by a Vaſſal, with Certification that he ſhall loſe his Superiority during his Life, it may differ the Caſe, as the Author thinks; and yet there is Contumacy in both Caſes: And the Infeftment in both, is given *in ſubſidium*.

N. If a Superior infeft, his Vaſſal being Minor, before the Marriage fall, by his attaining to the Age of *Fourteen* Years, may he claim the Marriage after it falleth? If he infeft him after the Marriage is fallen, whether doth he paſs from the Marriage?

S. If a Superior infeft his Vaſſal under Age, and before his Marriage fall, it may be thought, That unleſs he expreſly reſerve, he hath diſpenſed with it. But, if he infeft him after the Marriage is fallen, he rather enables him to pay it.

Marriage Clandeſtine.

N. BY the Act of Parliament anent unlawful Ordinations, theſe who are ſo married, amitting *jus mariti & relictæ*; *Quæritur*, If the Man loſeth his *Curiality*, or the Woman her *Terce*? Or only *jus mariti* as to the Communion of Moveables: Acts ſpecially penal, being *ſtricti juris*, and there being beſide, other Pains.

S. The Act of Parliament anent unlawful Ordinations, and making ſuch as *there* marry unlawfully, to amit *jus mariti & relictæ*, is reſcinded; but tho' it were ſtill in Force, the *jus mariti* could not be extended to the Curiality.

N. If *clandeſtinæ Nuptiæ* without Conſent of Parents, tho' they bind the Parties ſo that they cannot Marry with any other, will yet be null, as to Parents and Friends that the Children cannot ſucceed to them againſt their Will.

S. Clandeſtine Marriages with us have their own Pains; but the Marriages do ſubſiſt as to all other Effects.

Materna Maternis.

N. IF in no Caſe, that Maxim, *materna maternis*, has place with us? And in ſpecial, (in that *viz.*) If a Perſon ſucceed to his Mother, and deceaſe without Heirs upon the Father's Side, will the Fiſk exclude the Mother's Friends, the Eſtate being *profectitious* and deſcended from her?

S. The

S. The Heirs on the Mother ſide, are none, and cannot be admitted; ſo that if a Perſon ſucceed to his Mother, and deceaſe without Heirs on the Fathers ſide, there muſt be place for an *ultimus hæres*, tho' it appear to be very hard.

N. In *Allodialibus* there is no Succeſſion of the Mother or her Friends *activè*, but *in feudis fœmineis*: If a Son ſhould ſucceed to his Mother, and ſhould thereafter die, *Queritur*, Whether his Heirs upon the Father's Side, would ſucceed to ſuch Lands, or his Mother's Heirs. *Ratio Dubitandi*, That the ſaid Lands are given *ab initio, primo inveſtito* and his Heirs, which muſt be underſtood *hæredes ſanguinis*: And the Son having ſucceeded to his Mother, his Heirs upon the Father's Side cannot be thought to be Heirs either to her or her Predeceſſors: And therefore in that Caſe it is to be thought, That the Rule ſhould take Place *Materna Maternis*; and there is the like Reaſon in Patents of Honour, being *Quaſi feuda*, and being granted by the King to the Receiver of the Patent and his Heirs.

A Perſon as ſaid is, being infeft in Lands as Heir to his Mother, and dying without Iſſue, Whither will his neareſt Kinſman upon the Father's Side or the Mother's Side ſucceed to him in the ſaid Lands? *Ratio dubitandi*, That by our Cuſtom the Fathers Friends are always preferable; and the Rule *Paterna Paternis, Materna Maternis* has no Place: And yet it is thought, That *in mobilibus*, when a Perſon has Right to the ſame as Executor to his Mother, they go to the Neareſt of Kin upon the Father's Side; becauſe there is no *Affectio* as to *Mobilia*; and there is no Limitation, or Deſtination of Heirs as to theſe: But as to Lands, when a Right is taken to a Man and his Heirs, and a Woman ſucceeds to the ſaid Lands, and thereafter her Son as Heir to her, if the Son die without Iſſue his Mother's Heirs ought to ſucceed, ſeeing by the Infeftment no Perſon can ſucceed but he that is Heir of Blood to the Perſon firſt infeft, either immediately or mediately.

Quid Juris as to Bonds for Sums of Money? Answer. It appears that there is *eadem Ratio*, ſeeing there is in Bonds *Limitatio hæredum*.

S. The Author States the Caſe again *in feudo Fœmineo*, a Son ſucceeds to his Mother and dies without Iſſue, whether his Heirs on the Father's ſide, or his Mother's Heirs, will ſucceed in the Lands come by the Mother? But put the Caſe, That this *feudum Fœminium*, is only to a Man and his Heirs whatſomever, and that his Daughter ſucceeding to him therein, leaves a Son who is alſo her Heir; If he die without Iſſue, the Succeſſion muſt fall to the Father, and to the Heirs on the Father's ſide. And it cannot fall to the Heirs by the Mother, unleſs it were by ſpecial Proviſion, as if the Few were granted to a Daughter and the Heirs of her Body: Which failzieing, her Heirs and Aſſignies whatſoever. In this Caſe, the Son dying without Iſſue, his Father would not ſucceed to him: But his Mother's Heirs deſignative would ſucceed to him as Heirs of Taillie and Proviſion. *The Author thinks*, That the Lands being given *primo Inveſtito* and his Heirs, they muſt be *Hæredes ſanguinis*: And the Son having ſucceeded to his Mother, and then dying; his Heirs on the Father's Side cannot be thought to be Heirs either to her or to her Father, becauſe not of the Blood; and that here *Materna Maternis* holds. But this is a Miſtake: For, if there be no Entail, the Daughter will ſucceed to the *primus Inveſtitus*, leaving no Son: And her Son will ſucceed to her. But then, he dying without Iſſue, it will go out of the Blood of the *primus Inveſtitus*; and go to the Son's *Agnati*, as his lawful Heirs;

unleſs his Mother's Heirs had been [illegible] the Author wants to make good his Opinion in his [illegible] yet he ſays nothing new.

If Bonds were granted for Sums of Money limited or [illegible] there would be *eadem ratio*.

Matrimonium.

S. HERE we have only a Collection out of other Authors; which, tho' in itſelf probable; yet is not Law with us.

The Two next following Titles; *Menſis*, and *Menſura Taxative & Demonſtrative*, are alſo but Citations.

Militia.

N. THE Gentlemen that went out in a Troup in the late Expedition, having been at Charges for a Banner, Trumpet and Coat, &c. *Quæritur*, If the ſaid Charges may be laid upon the whole Shire? Answer, *Negativè*: Seing the *Militia-Horſe* did not go out: And it was *munus perſonale* upon the Heritors within Age to go out.

S. This is a particular Caſe, not of any Uſe now. But how the Charges of the Militia in general, is to be payed, was noticed above *Tit. Impoſitions Voluntary upon Shires.*

Mill.

N. A Defunct being in Poſſeſſion of a Mill, being a Horſe-Mill: Whether will the ſaid Horſe and other *inſtrumenta mobilia* that are in the Mill, belong to the Heir?

Quid Juris as to Mills when they are either ſet to Tenents, or poſſeſſed by Liferenters *quoad* the Duties of the Year wherein the Liferenter dies? *Vide Liferenter, Litera* L. and the like Caſes of *Third* and *Teind*, and *Titular, Litera* T.

S. Since the Mill will fall to the Heir, the Horſe and the other *Inſtrumenta* thereof, ſhould fall with it: Tho' *we*, it may be, would reckon this Horſe no otherwiſe than a Plough-Horſe that falls to Executors; if not with the Plough, as the *beſt Aught* to the Heirſhip moveable. *See Heirſhip moveable.*

As to Mills liferented, and either ſet to Tenents, or poſſeſſed by the Liferenter; the Rent will divide according to the legal Terms of the Year. But the Emoluments, when the Mill is poſſeſſed, as ſaid is, will be reckoned *de die in diem* upon the Liferenter's Deceaſe. *See Liferenter.*

Miniſters Stipends in a Reddendo.

N. IN Infeftments of Erection, the *Reddendo* is ordinarily a blanch Duty; and beſide, to pay to the Miniſter the Stipend therein mentioned. *Quæritur*, Whether the Stipend be *Debitum Fundi*? *Ratio Dubi-*

Dubitandi, That what is due upon the Reddendo, not relating to Lands' but to Teinds; which are not *fundus perfectus*, but a Benefit arising out of the Lands: Such a *Reddendo non afficit fundum*; no more than Teinds and a valued Duties.

S. Tho' Ministers Stipends be ordinarily mentioned in the *Reddendo*s of Erections; yet this makes not these Stipends to be *Debita Fundi*: Because Erections do often contain Teinds as well as Lands. And the *Reddendo* of the Stipends answers to the Teinds: Which not being a *Fundus* poindable, they cannot, by being in the *Reddendo*, become *Debita Fundi*.

Minor.

N. WILL the Heir of a Minor be restored upon that Ground, That the Lands being entailed, he resigned in Favours of the Heirs whatsomever? There being no Lesion to the Minor.

S. 'Tis generally thought with us, That a Minor may not alter the Succession of his Lands. And if he should make any such Alteration; It would be judged, if not a Lesion, yet an Effect of his Facility.

The next Title is, Minor non tenetur Placitare: *Where the Author gives us only a Rule That it holds not* ubi agitur de Dolo, culpa, vel Obligatione Defuncti.

Reduction upon Minority

N. LANDS being disponed to a Minor; and after his perfect Age the Bargain being questioned, as being to his Prejudice; in so far as the same was for Eighteen Years Purchase and a Half; and the same might have been bought at Seventeen, according to the Rate of the Times: *Quæritur*, If such a Lesion, not being enorm (and *modica*) be relevant? *Ratio Dubitandi*, The Defender contracted *bona fide* with a Tutor the Pupil's Father: And *Licet contrahentibus se invicem decipere:* And *non constat* notourly that that was the Rate: And some of the Witnesses declare the Contrair: And the Defender will get a Buyer at the same Rate. *Vide Annualrent for Damage, Litera* A.

S. Lands being either fairly purchased or sold by a Minor; a small Difference in the Price will be no Ground of Lesion, if it be only such as ordinarily happens in Buying and Selling.

Decreet against Minors.

N. IF a Decreet against *Minores indefensos*, no Curators being called in special but in general at the Market-Crosse if they have any, for their Interest, be null? *Ratio dubitandi, Gesta cum adultis non habentibus Curatores*

rtorus are not [illegible]
tur Curator ad [illegible]
& lata contra [illegible] *indefenſa ſententia,* [illegible] *re judicata vide Perez. Inſtitut. Lib.* 1. [illegible] *vitiis.*

S. Tho' the Curators of a Minor be only called in general at the Market-Croſs it is ſufficient; and the Decreet againſt the Minor will not be thought given *contra Minorem indefenſum.*

Mobilia.

N. IF *Mobilia* has *Situm*, when they are here *animo & deſtinatione Domini*; ſo that when they belong *v. g.* to *Engliſhmen* they are to be thought *Res Scoticæ* and to be affected with the Laws of *Scotland*; and he cannot diſpoſe of them by a nuncupative Will. And *e Contra*, If he ſhould change their *ſitum*, and tranſport them to ſtay in *England*?

S. If *Mobilia has Situm*, ſeems to be an improper Queſtion, for it is more proper that *Mobilia ſequuntur Perſonam*: And as to the Queſtion, If an *Engliſhman* in *England* could make a Nuncupative Teſtament as to Moveables in *Scotland*; to me, it is without Doubt, and that even a *Scotſman* reſiding and dying in *England*, may alſo make an nuncupative Teſtament, reaching his Moveables in *Scotland*: But in our Law we have a Rule as to the Probation by Witneſs, limiting the ſame to One hundred Pounds *Scots*; which being a Rule of Judgment, might incline our Judges to reject a nuncupative Teſtament, tho' made in *England*.

Mobilium vilior poſſeſſio.

N. *MOBILIUM vilior & abjectior eſt poſſeſſio & facilius acquiritur, & amittitur, quam immobilium; in ea non cadit tantæ affectio: non eſt Locus iis redhibitioni Gentilitiæ ſive juri* προτιμησεως Hering. de molend. quæſt 8. n. 58. & ſequent.

Mobilia ſequuntur conditionem Perſonæ ſive Domini, adeo ut ejus oſſibus adæreant active & paſſive: Immobilia autem co-hærent Territorio.

S. The beſt differencing Maxim betwixt *Immobilia* and *Mobilia*, is, That *Mobilia non habent ſequelam propter uſum Commercij.*

Modus habilis.

N. IF a Perſon having a Right to Lands (wherein another is infeft and in Poſſeſſion, ſo that he has the Benefit of a poſſeſſory Judgmen) ſhould diſpone his Right, which is preferable in Favours of the ſaid Party who is infeft and in Poſſeſſion as ſaid is; and thereafter another Perſon upon a poſterior Diſpoſition ſhould compleat his Right by Infeftment; whether or not will the ſaid prior Right at leaſt extend to,

and

and import
the ſingular
If a Reduction
paſſes *Simpliciter*
ſor; ſeing the
mentioned
gular Succeſſor?

IF at leaſt it were regiſtrate in the Regiſter of Saſines, it would prejudge, being none of the Writs appointed to be regiſtrat therein?

S. THE prior Right may indeed be thought to be a Diſcharge of the Action then depending; but it could not prejudge the ſingular Succeſſor by Infeftment, to raiſe a new Action; nor will the Purſuer's declaring judicially that he paſſes *Simpliciter* from the Reduction intented, bar a ſingular Succeſſor from intenting a new Action; becauſe the paſſing from an Action judicially does only diſcharge the Inſtance, but doth not transfer the Right; and tho' it were regiſtered in the Regiſter of Saſines, it would not mend the Matter.

Molendinum.

S. THIS and the Two following Titles; *Molendina Aquatica*, and *Molendina Bannaria*, are but *Latin* Citations.

Molendina navalia Immobilibus accenſentur.

" *N.* MOLENDINA navalia pro immobilibus habenda ſunt. *He-*
" *ring de Molendinis q.* 8. *n.* 26. quia ædificans ea intentione
" & deſtinatione extruit, ut ſemper & perpetuò non pro motu ſed pro
" molitura in ipſo flumine manerent; nec ὑδρομύλον & molendinum aquati-
" cum perpetuæ moræ cauſa ad ripam exædificatum, plus præſtare poteſt
" quam Molendinum navale; nec in illo quidquam nominari poteſt quod
" huic inſit, rotæ morales & cætera omnia. *idem q.* 8. 26. *& ſequen.* Ea
" deſtinatio & attributio ad molendum, molendinum immobile reddit.

S. Molendina navalia appear to be of the ſame Nature with other Water-Mills *ad Ripam exedificata*; and yet a Ship of a far greater Bigneſs and Value, and alſo built and intended for yearly Profits, is but reckoned amongſt Moveables.

THE Author has Nine ſhort Titles more in Latin *about* Mills; *but they are only Citations.*

If a Mother and her Friends may ſucceed.

N. IF in no Caſe *cognati* on the the Mother's ſide can ſucceed? ANSWER. It is thought that they ought to ſucceed; ſeeing the Son ſucceedeth to his Mother and her Friends; and *Jus Succeſſionis* ſhould be reciprocal, being founded upon Proximity of Blood, which is the

[illegible]

S. [illegible]

Mutuum.

N. MUTUUM & *Commodatum* and such other Contracts which are said *Re contrahi*, and not *nudo consensu*: *Quæritur*. If they may not be said to be contracted, when a Writ is subscribed thereupon, obliging Persons to lend Money, or *commodare*? ANSWER. Such Contracts cannot be said to be *Mutuum*, or *Commodatum*, *nisi Res intervenerit*: And yet *datur ex iis Actio præscriptis verbis*, or *in factum*.

S. Mutuum & Commodatum properly *Re contrahuntur*, *non nudo consensu*: And a Writ obliging Persons to lend Money, or *commodare*, is neither *Mutuum* nor *Commodatum*, but a Ground of a libelled Action.

N.

Non-entry.

N. IF the Superior of Lands holden feu, will have, during Non-entry, both the Feu-duty as his own, and the Non-entry Duty as Casuality and Fruit of his Superiority?

S. THE Superior of Lands holden feu, will only have the Feu-duty for the Non-entry Duty before Declarator: And if the Lands be holden *blanch*, the retoured Duty will be the only non-entry Duty before Declarator.

N. THE Superior being in Non-entry. *Quæritur*. Though the Non-entry were declared, whether the Liferent Escheat of the Subvassal would belong to the immediate Superior? *Ratio Dubitandi*. It is not a *feudale Delictum* and *commissum*; but *ex lege*, which is in Favours of the immediate Superior.

S. THE Liferent Escheat of the Subvassal would be reckoned an Accession to the said Non-entry.

N. IF the Superior suffer the apparent Heir to be in Non-entry and to possess without a Process for Non-entry; if he may have a real Action of poinding the Ground against a singular Successor?

S. THO'

S. THO' a Superior raiſe the apparent Heir to be in Non-entry, without raiſing a Declarator againſt him; yet the Non-entry Duty, *whether the Reſponſal-duty or Few, or Taxt ward Duty*, would be ſtill due, and a poinding of the Ground ſhall be raiſed for the ſame, even againſt a ſingular Succeſſor, for they are all *Debita fundi*: But the apparent Heir muſt be alſo thereto called, that the Non-entry may be found.

N. IF the full Duties will be due to the Superior upon account of Non-entry following the Ward; albeit the Superior was not in Poſſeſſion during the Ward?

S. IF the Superior was not in Poſſeſſion of his Vaſſals Lands during the Ward, the Non-entry following the Ward will not give him Right to the full Duties.

N. Quær. WHEN Lands are diſponed by a Baron to be holden of himſelf; If before Declarator of Non-entry the full Duties be due, when the Lands are diſponed without any mention of Retour and Extent? ANSWER. If the Lands be diſponed to be holden from the Diſponer of the King, a Proportion only of the Retour Duty is due; becauſe the King and the Diſponer having condeſcended that the old Barony ſhould be extended, That Part which is diſponed to be holden of the King *cenſetur eodem Jure* with the reſt of the Barony; But when the Baron diſpones a Part to be holden of himſelf without any mention of Extent, the full Duties may be claimed, at leaſt the Proportion of the valued Duty.

S. IT is thought, That before Declarator the Proportion only of the retoured Duty of the whole Barony will be due. For, what reaſon can there be, that he who falls in Non-entry, as to a Part of a Barony, ſhould be in worſe Caſe than the Baron himſelf, as to the whole Barrony.

Novo-damus.

N. THE King having granted a Charter with a *Novo-damus*, *Quær.* If he ſhould have ſucceeded to a Perſon having a better Right either upon Forefaulture, or Recognition, or as next Heir; will the *Novo-damus* bar him? Or if if the *Novo-damus* ſhould be underſtood to be reſtricted to any Right, or Pretence, or Claim, the King may have to the Lands by the Right of the Reſignant, as falling in his Hands by Forefaulture of him or his Authors, or otherwiſe from their Right, and the comitting of the ſame, either for ever, or for a Time?

Quid Juris as to other Superiors having ſucceeded to Perſons having a better Right?

S. WHEN the King grants a Charter with a *Novo-damus*, it ſhould in Law and Reaſon, carry all the King's Right: So that if the King had ſucceeded to a Perſon having a better Right, be it by *Forfaiture*, *Recognition*, or *laſt Heir*, the poſterior *Novo-damus* ſhould barr him; and much more this ſhould hold, as to the other Superiors, for all Right *quovis modo* in their Perſons preceeding the *Novo-damus*: For a *Novo-damus* is a new Feu; and although ordinarly intended to purge and

clear bygone Casualities, yet

and so ought to enjoy all Rights

Ni Quid Fuerit. If other Superiors have received an

signation, or otherwise: If they may question their

another unquestionably better, falling to them as

Person?

S. Tho' a Superior have received a Vassal upon Resignation, yet if a better Right than the Vassal's fall to him, he may claim the same: For he dispones no more than what was resigned.

N. Lands having fallen to the King by Forfaulture, the Person forfaulted having but a Right of Superiority, the Property belonging to Vassal's: *Queritur*, If upon Resignation of the Sub-vassal in the King's Hands as immediate Superior by the Forfaulture, a Charter with a *Novo-damus* will put him in that Condition, as if he had from the Beginning holden of the King; so that the King cannot interpose another Superior, by disponing the Superiority that did belong to the Traitor? *Ratio Dubitandi*, That the *Novo-damus* is equivalent to an Original Grant. And yet 'tis thought, That the *Novo-damus* is only an accessory Right, and in effect *Clausula executiva*; whereby the King gives the Property that belonged to the Resigner, with all Right he could pretend thereto; but not the Interest and Superiority that belonged to the Traitor, unless it were expresly disponed: *Et actus agentium non operantur ultra eorum intentionem.*

The King having granted to my Lord *Kincardine*, and thereafter to the *Chancellor*, a Gift of the Wards and Non-entries that had fallen, or should fall, during the Time therein mentioned respective; and thereafter having given diverse Infeftments with a *Novo-damus*. *Queritur*, If the foresaid Donators could be prejudged by the saids *Novo-damus*? Answer. It is thought that the saids *Novo-damus* are of the Nature of Gifts, or Discharges of such Casualities, which the King might grant before Intimation made to the Persons of the said Gifts.

S. The Sub-vassal of a Person forfeited, resigning thereafter in the King's Hands, as his immediate Superior by the Forfeiture, and getting a Charter by a *Novo-damus*; it states him the King's immediate Vassal: And it seems absurd, That the King should thereafter dispone the Superiority to another, seeing the Effect of the *Novo-damus* was to make the Sub-vassal the King's immediate Vassal.

The King, after having granted general Gifts of Wards and Non-entries, may nevertheless give Infeftments to particular Persons, with a *Novo-damus* to the Prejudice of these Donatars; for these general Gifts are also gratuitous; So that until a particular Action be commenced, the King may discharge by a subsequent *Novo-damus*.

THE following Three Titles: Vullitas ex Nerbis non licebit, Clausula ex nunc prout ex tunc, *and* Nundinæ; *are but Latin Citations.*

Oath

O.

Oath of Coronation.

N. IF what is required and promiſed by the King, the Time of his Coronation, be underſtood to be *Conditiones Regni*; ſo that the ſame not being fulfilled, the People is free? ANSWER, Theſe are not *Conditiones* either *Suſpenſivæ* or *Reſolutivæ*, but *modus Regnandi*. And albeit *Modus* ought to be fulfilled, and Subjects who are under a coercive Power may be urged to obſerve the ſame: Yet a Prince, who is ſubject to no higher Power, *relinquitur religioni Juramenti, & Deum ſolum habet ultorem.*

THESE *Simile*'s may be urged to this Purpoſe; *viz.* A Father is obliged not to provoke or wrong his Children, and that is *Modus* implied in the Relation of a Father; and yet if he do otherwiſe, the Relation is not taken away. And when Parties are Married, there is Stipulation *hinc inde* of mutual Duty, not only as to Chaſtity, but as to other Duties; and yet tho' they fail in the ſame, being only *modus vinculi Conjugalis*, the Marriage is not diſſolved, except in the Caſe of Adultery: That Duty of mutual Chaſtity being *inter eſſentialia*; and other Duties *inter naturalia Conjugii.*

S. THIS Queſtion, *If what is required and promiſed by Kings, the Time of their Coronation, be* Conditiones Regni; *ſuch as not being fulfilled, the People are free?* ſeems to carry the Matter too far. And our Claim of Right does determine the Point only as to the *open and intollerable* Breach of ſuch Conditions, as do reſpect the principal Ends of Government. But other Conditions leſs material, are indeed directive; but ſhould not irritate. As to the Notion, That they are only *modus Regnandi*: It ſignifies no more in *Latin* than in *Engliſh*. And to call theſe Promiſes and Conditions, The *Manner* only of the Kingdom, falls ſhort of the Obligation thereby intended.

THE Author gives us *Simile*'s: A Father is obliged not to wrong his Children; and this is his *Modus: But what if he exceed all Bounds?* And when Parties are married, there are Stipulations *hinc inde* of mutual Duty. But, *ſays our Author*, Every Failure does not irritate, becauſe, forſooth, the Stipulation is but *modus vinculi Conjugalis*: And yet if *Chaſtity* be violated, it is *inter Eſſentialia*. And there may be Severities beſide, that may allow and force a total Separation. But theſe Things are too delicate, and only to be conſidered *in Hypotheſi*: General Rules in this Caſe being dangerous.

Qualified Oaths.

N. WHETHER qualified Oaths may be received before Inferior Judges? ANSWER, It is thought, Not: The Queſtion whether the Qualities ſhould be conſtrued Qualities or Exceptions, being of that Difficulty, that they are not to be decided by Inferior Judges.

S. It is hard to say, That an Inferior Judge, if he may require and take an Oath, should reject all Qualities; or, That he is not to admit them to Exceptions. So that in this, as in other Things, much is to be committed *Religioni Judicis*; specially when the Party, conceiving himself wronged, has a Remedy at Hand, by Advocation or

N. The Lords are not in Use to receive Qualified Oaths, unless they be given in to be seen by the other Party, and upon Debate found Relevant: So that the Person who is to give his Oath [illegible] to Swear in the Terms of the same, as being properly [illegible] and not Exceptions. *Quæritur*, What Qualities ought to be [illegible]? And seeing 'tis the common Opinion, That intrinsick Qualities may be received: *Quæritur*, What Qualities are to be thought Intrinsick? Answer, These are intrinsick that are inherent in the Act and Matter in Question; *v. g.* If it be referred to the Defender's Oath, That he promised to pay the Pursuer a Sum of Money, he may declare in what Terms he promised, *pure*, *in diem*, or *sub Conditione*.

S. What Qualities are properly *Intrinsick*, and to be sustained; and what not; requires an acurate Judgment: And even as to these here instanced, specially as to *sub Conditione*, Questions may arise; and still the Matter resolves on the Judgment of the Judge.

N. If it be referred to the Party's Oath, that he is liable for a House-mail (having taken and dwelt therein) after three Years, *Quæritur*, If he may declare with that Quality that he paid the same? *Ratio dubitandi.* That it is extrinsick, and not a Quality but an Exception: On the other Part, *quomodo unumquodque ligatur, solvitur*; and the Debt not being proven but by his Oath, he may prove Payment the same way. *2do.* There is a Presumption in Law, which is the Ground of so momentary Prescription, That such Debts are not so long owing: And therefore it ought to be proven by the Defender's Oath they are owing. *3tio.* It is the common Practice, that Parties that are not bound by Writ, think they are *in tuto* to pay without Writ.

If he declare not *positive* that he paid; but that he assigned a Bond or Debt in satisfaction. *Quæritur*, If that Quality should be received? Answer. It is thought, that it is not intrinsick.

S. When it is referred to a Party's Oath, That having taken and dwelt in a House, he owes the House Mail, after three Years: If he declare that *As he owed, so he payed*; it is thought, That since the Debt is not constitute by Writ, and the Presumption is for his Payment within three Years; the Quality should be received. But what if he declare not *positive*, that he paid; but that he assigned a Bond or Debt, in Satisfaction? The Author thinks this Quality is not intrinsick: And yet the Deponent, if he had pleased, might only have declared, *Paid* or *Satisfied*: And if he made Payment by assigning, it can no more be expected, That he should have *Writ* upon his assigning, than upon his Payment: And Payment by Money, or satisfying by Bond, or other good Deed; appears to be alike probable. And it may be thought in general, That wherever Probation by Witnesses was once competent, but prescribed; if the Party thereafter insist upon the Defender's Oath; all Qualities thereto adjected, if not plainly inconsistent, ought to be received: For *sibi imputet*, who suffered his Probation to prescrive.

Correspective

Correspective Obligements.

N. QUID *Juris*, If there be correspective Writs of one Date, but not of one Term? As, a Disposition of Lands and a Bond of the same Date for Payment of the Price. If the Exception competent against the Buyer (viz. The Disponer cannot be liable unless the Price be paid) will militate against the singular Successor? *Ratio dubitandi*, The Disponer *sequitur fidem*: And the Obligement to pay the Price is not in *Corpore juris*; so that the Assigney is *in bona fide* to take a Right thereto; & *contra*, Personal Exceptions competent against the Cedent are competent against the Assigney, in Obligations personal *hinc inde*.

IT is informed, that there is a *Decision*, That such Exceptions are not competent against Assigneys.

S. THE *Disponer* seems here to follow the faith of the *Obligant*; and any Assigney may well take a Right to this Bond, where the Disposition probably will either declare, or suppose the Price to be paid; nor can the Granter of the Obligement obtrude the Cedent's Oath, which the Assigney hath no Reason to admit.

Mutual Obligements in Contracts.

N. IF there be a mutual Contract anent the selling of Lands and Payment of the Price; and the Buyer's Creditor comprise the *Minute* in so far as it is in his Favours; whether he will have Action for Implement unless he pay the Price? ANSWER. He will not: Seeing the final Cause of the Disposition is the Price.

S. THE Creditor pursuing for Implement, must offer to pay the Price; for this appears to be the very Import of the *Nexus* of the Contract: And so if the *Seller* should assign his Part of the Contract, the Assigney must make it appear that his Cedent hath disponed and denuded.

If Offices do Escheat by Horning?

N. IF the Keeper of a Register, or Writer to a Seal, be at the Horn; *Quæritur*, If his Office will fall under his Escheat? *Ratio dubitandi*, That nothing is escheatable but that which is transmitted, and is applicable to another: Whereas an Office is a personal Function, and *industria Personæ eligitur*, which is so personal that it cannot be conveyed by his Escheat to another.

IF at least the Rebel doth forefault his Interest, if he be Year and Day at the Horn? And *Quid Juris* as to Judges, who have Places from the King: And as to Commissars, and Ministers, that are presented by other Patrons: Whether by their Rebellion they be so disenabled, that they cannot enjoy their Places, and their Patrons can present others?

WHETHER at least Relaxation will repone the Rebel, and take away the Inability?

S. Officers, as Keeping of a *Register*, or Writing to a *Seal*, are conferred *ob Indaſtriam Perſonæ*: And therefore 'tis thought, That his Office will not fall with his ſimple Eſcheat; but, for the Liferent it it may be queſtion'd: But if the Office be in a Judicature, as of *Judge* or *Clerk*; his Denunciation takes from him *Perſonam ſtandi*, and makes the Office fall. But where the Office may notwithſtanding ſubſiſt, the Donatar to the Liferent offering to officiat, may pretend to the Perquiſites. But ſuppoſing the Gift once to hold, Relaxation never repones againſt what falls under it.

Omiſſa et male appretiata.

N. A Perſon being named Executor, and univerſal Legatar. *Queritur*, If a Teſtament *ad omiſſa & male appretiata* be confirmed; will the principal Executor loſs both the Office and the Benefit of the Legacy, as to what is omitted and *male Appretiat*? Answer. It is thought he will loſe both, in reſpect of his Fraud and Perjury; in the ſame manner as the Neareſt of Kin confirming, will in the like Caſe, loſe not only the Office, but the Benefit competent to him, as Neareſt of Kin, as to that which is omitted, or *male* Appretiate.

S. If a Teſtament *ad omiſſa & male appretiata* be confirmed, it will exclude the *principal* Executor; except in ſo far as he can purge himſelf of Fraud: For, if he have not omitted, or mal-appretiat *do loſe*, it were hard to take him ſo ſhort, and to cut him off; but if the principal Executor ſhould, through his own Fault, incur this Loſs; and if there be no Creditors, what he loſes *auferendam tanquam ab indigo*.

THE next Title, Operæ, *is only a Citation.*

Order of Diſcuſſing.

N. WHEN a Defunct doth oblige him and his Heirs, renuncing the order of Diſcuſſing. *Quæritur*, Will the Heir of the Line be liable to relieve the Heirs of Tailzie and Proviſion, as to ſuch Debts, for which by the Law he ſhould have been firſt Diſcuſt?

S. Tho' a Man oblige himſelf, and his Heirs *renuncing the Order of Diſcuſſing*; yet that ſhould not hinder the Heirs of the Benefit of Relief among themſelves, as the Heirs of Tailzie and Proviſion, againſt the Heirs of Line.

Pactis Privatorum non Derogatur Juri Communi.

N. WHAT Law that *Pactis privatorum non derogatur juri Communi*, what Way it is to be underſtood? And if it be only as to Solemnities or Formalities provided by Law, and not when the Law provides any Benefit in Favours of a Perſon, as a Communion in Favours of a Husband and Wife; or Courteſy or Terce, or ſuch like?

THE Prince, and under him the Judge; and in ſpecial νομος, εμψυχος (*ſed quis cuſtodiet ipſum Cuſtodem*) the Lords of the Seſſion, have not a legiſlative Power: And when there occurs a Caſe not formerly decided, and the beſt governed Nations do not agree anent the Point in queſtion; ſome being for the Affirmative, and ſome for the Negative; and upon probable Reaſons on both Sides, *ſuſtinendum Judicium:* Or, if the Queſtion be of an Exception from a general Rule; the Rule is to be ſtuck to, until there be a Law to the contrary; as in that Caſe, Whether Minors ſhould be debarred from the Remedy of Reſtitution, by their Oath; conform to the Novel *Sacramenta puberum:* Which in effect is to make a new Law.

S. *PACTIS Privatorum non derogatur juri communi*, is but a *Brocard*; and ſo may be variouſly apply'd. And indeed, Solemnities or Formalities, appointed by Law for the better aſcertaining of Deeds, ſhould be fairly obſerved; and not altered by Pactions. But when the *Jus Commune* provides only in Favours of private Perſons; as the *Communio bonorum* betwixt Man and Wife; or the *Jus Mariti*, or *Jus Relictæ*; or the Courteſy or Terce: All theſe may be regulate by private Pactions.

COURTS of Judicature not having a legiſlative Power, when a new Caſe occurs, ought certainly to conſider all Reaſons *pro* and *con*; and principally the *Analogy* of our Law, and what may be obſerved in other Parts, with the greateſt Veriſimilitude; and that their Judgment ſhould be ſuſtained. And if there be a general Rule, tho' an extraordinary Exception occur, yet the general Rule ſhould prevail; for in many Caſes it happens, *illud quidem durum eſt, ſed ita Lex ſcripta:* And tho' the Oaths of Minors were ſuſtained of old, to debar them from Reſtitution; yet an Act of Parliament was made on the contrary.

Parliament.

N. IF Reductions may be purſued ſummarly before the Parliament *in prima Inſtantia?* It is thought, that although when my Lord *Lauderdale* was Commiſſioner, that was done, in the Caſe of the *Lord Forreſter againſt General Ruthven*'s Relict; and at the Inſtance of the *Lord*

Dundie against Pitten; and [illegible] is now a [illegible] of *Edzel* against *the Earl of Crawford*, for reducing the said Earl's Title: Yet such Processes would not be sustained before the Parliament, If it were represented, That by diverse ancient Laws, and for great Reasons it is provided, that all Complaints *in civilibus* should be first pursued before the Judge Ordinary.

S. The Author judges well, That Reductions *in prima Instantia*, should be pursued before the Parliament: But that all civil Actions should be first pursued before the Judge Ordinary, as thereto by Law appointed. And it is in effect too much, that *Protestations for Remed of Law*, should bring civil Causes to be reviewed in Parliament; for our Parliament were at least far better constitute for settling general Laws, than for discussing the private Rights of Parties.

Passing from a Right.

N. IF a Tacksman of Teinds having a Tack yet to run, take another Tack of the said Teinds: Will he be thought to pass from the Former?

S. He should not be judged to pass from the Former; unless the Circumstances of the Case persuade that the new Tack was taken *animo*.

Patents of Honour.

N. PATENTS of Honour being granted to a Person, and his Heirs Male of his Body: *Quæritur*, 1*mo*. Whether the appearant Heir may sit in Parliament and not be liable as *Behaving*? *It is thought*, (whatever may be pretended as to Custom) in strict Law he should be liable; seeing in general, the owning an heretable Interest is *aditio passive*, and *gestio pro hærede*. 2*do*. *Quæritur*, If a Patent and Title thereby may be resigned as *feudum*, for a new Patent to the Resigner, and other Heirs in the Former? And if it may be resigned; *Quæritur*, If the Resigner must be first served Heir?

N. If a Nobleman, having a Patent to him and the Heirs Male of his Body, should thereafter resign his Title, and obtain a new Patent to him and his Heirs Male of his Body; which failzieing, to his Eldest Heir Female, without Division: And if the Heirs Male should fail; may a Nobleman, who in the *Interim* has got his Title betwixt the First and the Second Patents, claim Place before the Heirs Female, as having Right by the Second Patent, being before theirs: Or, If the Heirs Female will have Place, as representing their Predecessor, who had Place by the First Patent; seing the Second is but a continuing of the First in Favours of him who got it, with an Alteration only as to his Representatives: And they who had posterior Patents were not concerned who should represent him: And 'twas uncertain whether the First Heirs should fail: So that they might have any Prejudice by the Change. *Roxburgh* contra *Lothian*.

S. A Patent of Honour is ordinarily granted to a Perſon and his Heirs Male: Yet his apparent Heir is allowed to ſit in Parliaments, and it is not judged a Behaviour.

As for the *Reſigning* of Titles of Honour; It was thought of old, That they ſhould not be reſigned *in favorem*, but at beſt, *ſimpliciter*: But now they are commonly reſigned *in favorem*: And even the Heir not ſerved may Reſign: And ſo they paſs with the ſame Precedency.

That the Caſe above ſtated was the Caſe of *Roxburgh* contra *Lothian*, is doubted; tho' *Lothian*'s Pretence was founded on the Right of the Heir Female: But now that Conteſt is ended.

Pecunia Pupillaris.

N. IF a Tutor uplift the Mails and Duties of Lands, *a quo tempore* will he be liable to ſtock the ſame, ſo that the Pupil's Means be not unprofitable? Or, If this be not *Caſus arbitrarius*, according to the Variety of Circumſtances?

If a Tutor be not liable for Annualrents? And when ſhould they be ſtocked?

S. The Lords of Seſſion have found, That a Tutor ſhould *ſtock* his Pupil's Annualrents Once in his Tutory: But as to the Rent of Lands, within a Year after it is due. Yet if it could be clearly proven, when Annualrents as well as Rents of Lands were really uplifted, they ought at leaſt within a competent Space thereafter, to bear Intereſt as lying Money: For ſo a provident Tutor would behave *in re propria*: And he ought to take the ſame Care of his Pupil.

In the Civil Law there was not that *Strictneſs*, That Tutors ſhould lay out their Pupils Money for Intereſt, 'tis like becauſe of the Uncertainty of Debitors. For they ſeem to have been allowed rather to keep Money for the purchaſing of Lands, or the like ſure Rights.

The Two following Titles; Perſonalis Actus, *and* Pignora, *are but* Latin *Citations.*

Plenishing.

N. BY Contract of Marriage, a Wife is provided, in Satisfaction of Terce, Third, or other Part of Moveables, except the Half of the Pleniſhing of the Houſe the Time of the Husband's Deceaſe, whereto, it is provided, ſhe ſhall have Right. *Quæritur*, If there be no free Gear, Will the Heir be obliged to free the Half of the Pleniſhing? *Ratio Dubitandi*, The Contract bears ſhe ſhould have Right: And ſhe is in the ſame Caſe as if her Husband had diſponed, for an onerous Cauſe, the Pleniſhing he ſhould have the Time of his Deceaſe. And on the other Part, it ſeems this Proviſion ſhould be underſtood *conditionaliter*, if there be free Goods. And the Clauſe being an Exception from a Renunciation, both the Renunciation and Exception from it ought to be of the *Regula*, and of that which would belong to her, if ſhe were not excluded, which could only be the free Gear.

If the Clauſes do not bear *beſides the Heirſhip*: *Quæritur*, If ſhe will have Right to the Pleniſhing, without Deduction of the Heirſhip? *Eadem Ratio Dubitandi.*

S. WHEN in a Contract of Marriage in W[illegible] ction of farther Terce, Third, or other Part of [illegible] of the Plenishing the Time of the Husband's Dec[illegible] disponed on declared to belong to her: This is [illegible] a good Right without Respect to Debt; albeit, [illegible] It may be thought but an Exception from her ten[illegible] the whole Moveables; which Right is always *debitum Debitæ*: But the Clause in this Case is a Transaction; and if the Clause do not bear, *beside the Heirship*, it's thought the Heirship should be included: But now for greater Caution, the Clause ordinarly bears, *without Deduction of the Heirship*: But certainly, the Time of the Contract the Husband is supposed to have the full Property, and the Heirship never comes to be reckoned till after his Decease.

The Author's next Title, Possessor, *is only a Citation.*

Poinding of the Ground.

N. A LORD of Erection having disponed Teinds, and the *Reddendo* bearing a Sum to be paid for a proportionable Relief of the blanch Duty, payable by the Lord of Erection; and certain Bolls of Victual to be paid also for his Relief to the Minister: *Quæritur*, Will the Minister have Action for Poinding of the Ground? *2do.* What will the Superior's poinding the Ground import?

S. We had this Question *before*, and 'tis still thought, That the Subject being Teind, which is not a *Fundus* poindable; there can be no Poinding of the Ground.

N. A Decreet of Poinding the Ground being got against the Heretor for the Time and the Tennants: *Quæritur*. If after the Death of the Heretor, the Lands may be compriſed for the By-gones from the appearand Heir, without a Decreet of transferring, or a new Decreet? ANSWER. It is thought, there is no need of any other Decreet; the Decreet being really founded; which may be recovered against an appearand Heir, and put in Execution by compriſing, or poinding against him.

S. A Decreet of Poinding the Ground being obtained against the Heretor, and his Tennants; the Lands may be compriſed after the Death of the Heretor, from his appearand Heir, without a new Decreet, or a Decreet of transferring; becauſe the Decreet of Poinding is against the Ground, and bears that failzeing of Goods, and Gear poindable; the the Ground Right ſhould be appriſed and adjudged.

Prerogative.

N. IF the Queſtion betwixt *Roxburgh*, and *Lothian*, ſhould be determined with Reſpect to his Majeſty's Prerogative being the Fountain of Honour? It is thought, That His Majeſty's Conceſſions, whatever

ever the Subject [illegible] *Quæstion*, whether any Prescription, or Custome, can not be taken away upon any such Pretence. The Prerogative is *Mare Littoris*, which is defined *quo fluctus Hyberni æstivi*? So that as the Sea does not go beyond the Shoar when the Sea is most full; so the Prerogative and *Plenitudo Potestatis* does never go beyond Law, which is a great *Limes*, and Boundary of juſt Power.

The Royal Prerogative is acknowledged and aſſerted by diverſe Laws and Acts of Parliament of this Kingdom; but how far the Extent of the ſame may reach, is a Point of State and Policy of the higheſt Nature and Importance; and not to be defined by the Opinion of Lawyers, but by the higheſt and legiſlative Authority.

The Royal Prerogative is not only aſſerted in the General by the Laws of this Kingdom, but diverſe and great Powers, Rights, and Priviledges belonging thereto, are in ſpecial declared by diverſe Acts of Parliament; both in Relation to the Government, and in Relation to His Majeſty's Intereſt, and Queſtions and Cauſes, betwixt Him and His Subjects; *as, The Power of Calling and Diſſolving Parliaments; The Chooſing and Appointing Officers of State, and Commiſſioners and Judges; To make War and Peace, and that there can be no Meetings to Treat or Determine in Matters of State, without His Majeſty's Authority and Warrant: And that upon no Pretence there can be any Riſing in Arms without his Warrant; and His Right to Cuſtoms; and Power to grant Remiſſions for the higheſt Crimes: And that the Negligence of His Officers cannot prejudge Him.* And albeit, by the common Law the eldeſt Superior is preferable; yet when Lands are holden of diverſe Superiors Ward, the Marriage of the Vaſſal, which otherwiſe would belong to the eldeſt Superior doth pertain to the King, tho', as to the Vaſſal, his lateſt Superior: And by Cuſtom, albeit the going to a Miln, for never ſo long a Time, being *facultativa*, doth not import Servitude without a ſpecial Aſtriction; yet the repairing to His Majeſties Milns, by the ſpace of Forty Years, doth induce a Servitude, without any other Conſtitution: As to which, and other Points of the Prerogative, explained by Law and Cuſtom, Lawyers may and ought to give their Opinions in Law.

But as to Lawyers and Juriſ-conſults, it is ſaid, *Turpe eſt ſine lege loqui, & ubi leges ſilent* they cannot but be ſilent: And the Laws of *Scotland*, which ought to warrant the Reſolutions and Opinions of Lawyers, in Queſtions concerning the State and Government, are only the Statutory Law and Acts of Parliament, and the common Law and Cuſtom, and undeniable Pratique of the Kingdom.

As to the Civil Law of the *Romans*; it was only the Municipal Law of that People; and by Reaſon of the great Equity of it, in Queſtions *de Jure privato*, tho' it it has not the Force of Law with us; yet it is of great Authority and Uſe in Caſes not determined, either by Statute or Cuſtom: But as to Queſtions of State and Government, the Civil Law is of no Uſe with us; in Reſpect the Laws of all Nations, concerning their State and Government, are only municipal; and the Conſtitution of the reſpective States doth vary both from that of the *Romans*; and for the moſt Part, each from another; So that any Queſtions, concerning the ſame, cannot be ſolidly, or warrantably Anſwered, upon Principles or Reaſons, brought from any Law, but the Conſtitution of the Government, and Laws, and Cuſtoms of the Nation and Kingdom concerned.

[illegible] freely, and without Prejudice, which they cannot [illegible] ſty has any Way predetermined them, by declaring his own Royal Will and Pleaſure.

A. As to that *Queſtion*, What can be ſaid in Law in Defence of thoſe who have acted contrary to Law, in Obedience to His Majeſty, or upon his Royal Diſpenſation; if they ſhould be queſtioned in the Time of ſucceeding Kings?

'Tis anſwered, That upon the Grounds foreſaid nothing can be ſaid poſitively, to ſecure them from Queſtion, either by our Law or Cuſtom; the ſaid Caſe being not mentioned nor determined by either. But 'tis to be thought and preſumed, That, His Majeſty's Prerogative being aſſerted by the Laws foreſaid, and His Majeſty's owning that Power to *Command* and *Diſpenſe*, as a Part of His Prerogative, and they conceiving that 'twas not their Duty to diſpute His Majeſty's Power; ſucceeding Princes will not think it their Intereſt to be ſevere againſt any Perſon for exceeding in Obedience to their Royal Predeceſſors.

S. The Author thinks juſtly that the Prerogative ſhould keep within the Boundary of Law, and that it can only be meaſured by the particular Conſtitution and the Laws and Cuſtoms of every Kingdom and State, and the true Principles and Reaſons thereof: But to define it's Extent, is too delicate a Point to be farther inſiſted on.

Preſcription.

N. IF a Feu-Charter of Kirk-Lands, not confirmed by the King or Pope, with Saſines thereupon, may be a Title to warrant Preſcription?

S. It ſeems it may, ſeeing this Preſcription of Forty Years, as qualified by the Act of Parliament 1677, excludes all Nullities and Objections, except that of *Falſhood*.

N. Temporary Preſcriptions, as in Caſe of Houſe-Mails, Servants Fies, Ejections, *&c.* If they run againſt Minors?

S. Short Preſcriptions, as in the Caſe of Houſe-Mails, Servants Fies, Ejections, *&c.* are introduced; not ſo much to be a Check for Negligence, as for the common Intereſt of the Lieges. And therefore it may be thought, That theſe Preſcriptions ſhould run againſt Minors; albeit the long Preſcription of Forty Years, being principally introduced to correct Negligence, doth not run againſt Minors: Yet this is by ſpecial Proviſion of the Act of Parliament.

N. The Vaſſal retouring his Lands to be in Non-entry Fourſcore Years: *Quæritur*, If he may object Preſcription *quoad* the retoured Non-entry Duties: Seeing after the Years of Preſcription, he confeſſeth the ſame to be due: *Et Temporalia ad agendum ſunt perpetua ad excipiendum?*

S. Tho' a Retour ſhould bear Lands to be in Non-entry Fourſcore Years; yet the Superior cannot purſue for Non-entry Duties beyond For-

Party; the [illegible] of the Inquest [illegible] Conditions, signifies nothing.

N. If His Majesty's annexed Property does prescribe?

S. His Majesty's annexed Property doth not prescribe: For the King is secured by Law against the Neglect of his Officers, specially as to his annexed Property.

N. If Prescription run against these who were forfaulted by the Usurper, *qui non valebant agere:* Found for the Negative, *Lauderdale* contra *Tweeddale*; That *Lauderdale* his Father and Good-Sire *non valebant agere*; because upon his Father's Resignation, Queen *Anne* was infeft in Liferent, and might have excluded them during her Lifetime: And tho' he might have intented a Declarator; yet that being such an Action as could not bring him to Possession, he was not obliged to intent it. This Reason appears not to be without some Question, seeing if there were a Liferenter and Fiar, and the Fiar should not prevail with the Liferenter to join in an Action for interrupting Prescription, the Fiar should be without Remedy, if he would not interrupt by Declarator. And if a Declarator do interrupt, it cannot be said that *non valebat agere*. 2*do*. A Declarator would have brought the Lord *Thirlestan* to divid Possession, at least so far as it would have been declared that the Queen's Possession was his: And by Vertue of the Right thereof he was Fiar. And if the Queen would not own the Possession to have been by that Right, she should have been forced to remove: So that by that Action they might have attained natural Possession.

S. It may be thought, That a Fiar, excluded all the While by a Liferenter, should be excused in the Case of Prescription, as *non valens*. And the Necessity of raising a Declarator for Interruption, doth not appear, while the Fiar stands precluded, as said is: And Prescriptions are odious.

N. Before the Act of Parliament 1621 anent Compriſings, the Legal ran against Minors: Which argues, That the Temporary Prescriptions of Spulzies, House Mails, Removings, &c. run against Minors.

S. This doth not appear unreasonable; *short* Prescriptions being more the common Concern than the Punishment of Negligence, as above, Q. 2.

N. Item, If Prelates, provided before the Act of Parliament 1585 against Dilapidations, may, notwithstanding thereof, set Tacks without Hazard; seeing the Act seems to militate only as to Persons provided thereafter?

If a Feu set contrary to the said Act against Dilapidations, may be a Ground of Prescription? *Ratio Dubitandi*, That by the said Act, the Patrimony of the Prelates is *extra Commercium*, and is of the Nature of the annexed Property: *Et quod non est alienabile, non est præscriptibile. Vide Dilapidation in litera* D.

S. A Feu set by a Church-man contrary to the Act of Parliament 1585 against Dilapidations, may be a Ground of Prescription: Seeing the Act

of [illegible]
Preſcription [illegible] and
the Diſparity [illegible]?

N. If in all Caſes, when an Obligement or [illegible] in the Defender's Right, whereby he bruiks, may be alledged Preſcription; as he cannot do in the Caſe of Reverſion, there being *Eadem Ratio*?

S. It ſeems, That in all Caſes where a Perſon's Intereſt and Right is in the Body of the Righ whereby the Defender bruiks, the Defender cannot alledge Preſcription more than he can do againſt an incorporate Reverſion.

N. What is the Reaſon that Reverſions regiſtrate, do not preſcrive? Seeing Bonds regiſtrate do notwithſtanding preſcrive.

S. 'Tis to be adverted, That *Reverſions must* be regiſtered: And tho' Bonds *may* be regiſtered, and actually be regiſtered; yet there is no Neceſſity for it; Whereas the Regiſtration of Reverſions is by Statute appointed for the Information of all concerned. And this appears to be the Reaſon of the Difference; and it is good.

N. If a Faculty granted to a Perſon; as *v. g.* to the Diſponer of Lands, and a Power to diſpone the ſamen, or to redeem upon a Penny doth preſcrive, being granted a-part?

S. A Faculty to the Diſponer to redeem upon a Penny, or to burden at Pleaſure, if granted a-part, doth preſcrive; unleſs it be granted by Way of Reverſion, and regiſtered.

N. If, Preſcription being alledged againſt a Bond, it be relevant to reply and offer to prove by the Excipient's Oath, That to his Knowledge the Debt is due and true, and not ſatisfied?

S. Prescription being alledged againſt a Bond, it will not be relevant for the Purſuer to reply and offer to prove by the Excipient's Oath, That to his Knowledge the Debt is true, and ſtill reſting: Becauſe the Action on ſuch a Bond is utterly preſcrived; as even an Action on ſuch a Promiſe, tho' referred to the Defender's Oath, is alſo preſcrived: Becauſe the Act ſtatutes, That all Actions upon Bonds, Reverſions, Contracts, or others whatſoever, ſhould be purſued within *Forty Years* after the Date thereof, or otherwiſe preſcrive.

N. If a Reverſion be granted only for Five Years: *Quæritur*, If in that Caſe it preſcrives againſt Minors? *Vide De Retractibus Gentilitiis.* If they preſcribe againſt Minors?

S. It is by expreſs Statute, That the Legals of Compriſings do not run, which before did run. And here 'tis the Heritor's Intereſt that the Reverſion ſhould not be protracted. And therefore 'tis thought, That if theſe Years run againſt a Minor, he hath only his Tutors and Curators to blame, and his Remedy againſt them.

N. If a Minor acquire Right to a Compriſing near expired, *ſingulari Titulo*, Will the Reverſion be prorogate? And if there be a Difference betwixt a Minor ſucceeding as Heir, or otherwiſe, *ſingulari Titulo*?

S. This

S. THIS Caſe is wrong ſtated, for it ſhould be, If a Minor acquire Right to Lands compriſed, but the Reverſion not run; or in ſhort, to a Reverſion of an Appriſing, led againſt a Major; Will the the Running thereof ſtop? And it's thought it ſhould; becauſe the Act of Parliament does not diſtinguiſh: And the Expiration of Reverſions is unfavourable, as hath been above marked.

Preſcription againſt the King.

N. THE *Act of Parliament* 1617, militateth againſt the King, as to real Actions; when the Defender has preſcribed a Right by Poſſeſſion, founded upon the Rights therein mentioned; as appears by the expreſs Words, and the Ground of that Preſcription being not ſo much *odium & negligentia non petentis*, as *favor poſſidentis*, which is the ſame as to the King as to another; But in that Part of the Act, anent the Preſcription of perſonal Actions, there is no Mention of the King, and he cannot be ſaid to be negligent: and it is declared by Act of Parliament, That the negligence of his Officers ſhall not prejudge him. *Quæritur*, therefore, If Preſcription in that Caſe be competent againſt the King?

VERBA ſemper & quandocunque *deſignant temporis infinitatem: & ſi in pacto de retrovendendo adjiciatur hæc clauſula*, ut quandocunque venditor, & ejus hæredes velint pretium offerre, Prædium recipere poſſint, *non obſtante triginta annorum præſcriptione, Jus redimendi ſemper & in perpetuum competit; niſi poſſiderit Emptor pro ſuo; vel contradixerit Reluitioni: ab eo enim tempore incipit præſcriptio: In Contractibus enim nullum verbum debet eſſe otioſum, verba autem* quandocunque &c. *eſſent otioſa ſi non operarentur.* Theſ. Beſ. Littera *I. verbo* 5. Jure und. Allwegen, Pag. 423, & 424.

PRINCEPS poteſt privato Privilegium concedere, ut ipſe ſolus in aliqua parte maris aut fluminis publici piſcari poſſit; alioſque ne id faciant prohibere: Loca publica, & quæ Jure Gentium communia ſunt, præſcribi poſſunt tanto tempore cujus initii memoria non exiſtat: Præſcriptio enim immemorialis vim habet privilegij ſeu Tituli, & potius præſumpta conceſſio quam præſcriptio dicitur; & præſumptio ex ea exſurgens eſt Juris & de Jure, nec admittit probationem in contrarium. Jus Fluviatile, Pag. 260. n. 261.

PRÆSCRIPTIO impium præſidium, Novel 9.

RESPUBLICA & municipium non reſtituitur adverſus Præſcriptiones temporales; quæ Jure veteri reſpuebant reſtitutionem. Vide Friſch. Tom. 2. Exercitat. 2. n. 58. & ſequent.

JURE Novel: præſcribitur contra Rempublicam & Civitatem, triginta vel quadraginta Ann. ibidem, n. 63.

PRÆSCRIPTIO Conventionalis a Defuncto cœpta, currit contra Rempublicam quæ ei ſucceſſit. ibidem, n. 65.

IN Præſcriptione, Jure Civili bona fides requiritur ab initio, nec deſinet uſucapiens acquirere licet mala fides ſuperveniat: Jure autem Canonico bona fides requiritur toto tempore.

REQUIRITUR etiam Titulus, id eſt, juſta Cauſa poſſeſſionis & habilis ad transferendum Dominium.

RES furtivæ & vi poſſeſſa Jure Civili uſucapi nequeunt. Perez. Inſtit. Tit. 10.

NIHIL enim operatur bona fides aut Titulus [illegible] tio purgato nempe re furtivâ reverſâ in poſſeſſionem [illegible]

SERVUS fugitivus non uſucapitur, quia fugiendo ſe furtum facere dicitur.

SI quis malâ fide, abſente furtè Domino vel negligente aut ex decedente ſine ſucceſſore, fundum alienum poſſederit & venderet Emptor bonæ fidei, non obſtat uſucapioni vitium quaſi rei furtivæ; non enim fundi locive furtum committitur, aut rerum immobilium facilis eſt interverſio.

RES Fiſci uſucapi non poſſunt quia Juris publici ſunt: bona autem vacantia uſucapiuntur quæ heredem non habent, ſi antequam a Fiſco occupentur ab alio poſſideantur; quæ verò dum Fiſco denunciata, non ſunt Fiſci, ſed manent in Commercio.

S. The Act of Parliament 1617, anent the Preſcription of heretable Rights, makes the poſitive Preſcriptions therein ſet down, to run againſt the King as well as others: And this indeed *ob Favorem Poſſidentis.* But the negative Preſcription, ſtatute by the ſame Act, doth not mention the King; and indeed the Ground thereof is rather *Negligence*, which cannot prejudge the King; becauſe it is the Fault of his Officers. But the negative Preſcription ſeems to be as general, ſince it comprehends all Actions whatſomever: And it may be ſtill doubted, If the King's annexed Property can preſcribe, becauſe of the Strictneſs of the Annexation; and that Kings, as to their Patrimony, are ſtill judged Minors: And therefore it's thought, That no Preſcription, either *poſitive* or *negative*, can be objected againſt the annexed Property.

The Latin *Citations are to very good Purpoſe.*

Preſentation upon Forefaulture.

N. Quær. IF a Compoſition be due to the Superior for receiving a Vaſſal, preſented by the King upon a Forefaulture? *It is thought*, That it is not due; ſeeing he is obliged to receive him, and the Lands belonging to the King by the Forefaulture; he does a Favour to the Superior by preſenting One in his Place.

The King having preſented a Vaſſal to the immediate Superior, ſome Years after the Forefaulture of the former: *Quæritur*, Whether the Perſon preſented will have Right to the Duties become due ſince the Forefaulture; or if the ſame will belong to the Superior? But it ſeems, the King having no Right to the Lands, which he cannot hold of a Subject; but having only Right to preſent a Vaſſal in the *interim*, the Duties ſhould belong to the Superior, ſeeing the Property belongs to no Perſon; and the Superiority draws unto it the Right of Property, and the Superior not having a Vaſſal, ought to have the Duties of the Lands; otherwiſe if the King ſhould not preſent for many Years, he ſhould want the Fruits and Benefit of his Superiority: And it is not his Fault that he wants a Vaſſal, ſeeing hardly he could force the King to preſent.

S. A Superior cannot crave a Compoſition for receiving a Vaſſal preſented to him upon a Forfeiture: For the Lands are forfeited to the King; and he does the Superior a Favour to preſent One to be his Vaſſal.

But

But if the King delay for some Years to present a Vassal upon Forfeiture, it seems to be Law, That the Superior in the *interim*, should have a Right to the Duties of the Lands, which are in a Manner in Non-entry; and the Superior hath nothing else for his Vassal; nor doth the Law afford him any other Remedy, if the King should forbear to present.

Process against Strangers.

N. IF a *French*-Man or *Hollander*, *v. g.* should retire out of *France* or *Holland*, hither, and should be pursued in this Kingdom at the Instance of these who have contracted with him in the Place where he was: *Quæritur*, If Process should be sustained against him here? And if it should, according to what Law should he be judged? Seeing our Judges are not presumed nor obliged to know any other Law, but our own and the civil Law. ANSWER, They ought to have Process according to the Law of the Place where they contracted, which may be known upon a Commission.

S. IF a Stranger be pursued in this Country, at the Instance of any Party contracting with him in the Place of his native Residence, Process cannot be refused: But he should have the same Benefit for his Defence, as if he were pursued in the Place of the Contract; and the Verity of his Alledgiances may be tried by Commission.

N. SEEING *Mobilia* and *Immobilia habent situm*, *viz. illa fixum*, *ista vagum*, *Quid juris* as to *nomina Debitorum*, *utrum sequuntur personam Debitoris an Creditoris*? So that a Debt due by a *Scots-man* to a Stranger should be considered as a *Scot*'s Interest & *res Scotica*; and a Testament concerning the same should be confirmed in *Scotland*.

S. WE had this Question before, as to *Mobilia & Immobilia*, *qualem habeant situm*; and so as to *nomina Debitorum*: But *Mobilia sequuntur Personam*, *& Creditoris quidem*, as to the *Jus Crediti*; but *Debitoris*, also to affect his Person and Goods, wherever found. But still tis thought That the *Locus contractus* should regulate the Debt, and the Creditor be allowed to dispose upon it, either by Assignation or Testament, according to the Law of the Place.

N. QUID Juris as to Annualrents, when the Laws of the Place where the Creditor lives, and our Laws, do vary?

S. IF the Annualrent were not specified according to the Law of the Place where the Debt was contracted, 'tis like our Judges would *decern* as it may be exacted with us. But suppose the Bond were granted where the Law allows Ten *per Cent.* and that this Debt came to be pursued with us; in all Reason the Annualrent of the Bond ought to be *decerned*, and there the Debitor should be allowed to pay it: For there appears no Reason why the Faith of Bargains of this Kind should not be observed.

N. QUID Juris, When the Debitor being a *Scots-man* and having granted Bond in *Scotland*, has retired elsewhere, both as to the Effect of Confirmation and Annualrent, whether lawful or no lawful? And if

Agreement ſhould be ever conſidered as [illegible] Place where the Debitor was *Ante* the Time of the Contract.

S. When the Debitor, a *Scotſman*, grants Bond in *Scotland*, and retires elſe where; 'tis thought, he ſhould only be liable any where for *Scot*'s Annualrent, for ſuch is the meaning of Parties; and if a Creditor ſhould ſtipulate more Annualrent in *Scotland*, it is by Law reprobate.

Procuratories of Reſignation.

N. IF Procuratories of Reſignation, granted by Magiſtrates, expire by the Deceaſe of the Granters?

S. A *Procuratory* of Reſignation granted by an Incorporation, *that is*, by its Magiſtrates, and Adminiſtrators, dies not with the Granters; but is the *Procuratory* of the Incorporation.

Promiſe to diſpone, but not in Writ.

N. IF any Perſon or their Heirs may be purſued, for Implement of a Promiſe to diſpone Lands and Heretages; it being referred to the Oath of the Perſon that made the Promiſe (or of his Heir if he be deceaſed) that ſuch a Promiſe was made? Answer, That it is thought that as when upon a Treaty and Agreement Writs are drawn, Parties may reſile, befor Writs be ſubſcribed: There is *eadem*, if not *major Ratio* in Promiſes, which cannot be perfected but in Writ, *Et nihil actum creditur, dum quid ſuperſit agendum, niſi accedit Juramentum. Vide Emphyteoſis*; and what the Lawyers ſay in ſuch Caſes, where Writ is neceſſary.

S. It is thought, that the Promiſe to diſpone, if the Diſpoſition muſt be in Writ, is no relevant Ground of Action, tho' referred to Oath; becauſe there is *Locus Pœnetentiæ:* But what if the Promiſe had been given *upon* Oath, which ſeems to exclude *Locum Pœnetentiæ?* And if this promiſſory Oath were purſued upon, it is thought it ſhould be binding, *ut evitetur Perjurium.*

Protections.

N. IF Perſons cited to appear before the Juſtice or Council, or impriſoned by order of the Juſtice or Council, may be taken or arreſted upon Caption or otherwiſe, for a civil Debt, though they have not Protections?

S. If a Perſon cited before the Juſticiary or Council, be taken up by a Caption before his Appearance; theſe Courts would nevertheleſs cauſe ſiſt him before them. And where the Council did impriſon, and the Priſoner happen'd to be thereafter arreſted for civil Debt, the

the Council were in Use to set at Liberty, without Respect to such Arrestments; and to give the Person enlarged *Twenty Four Hours* free.

Provision in Favours of Bairns.

N. IT was provided by Contract of Marriage, That the Conquest should be employed upon Rights to the Husband and Wife in Conjunct-Fee, and to the Bairns of the Marriage in Fee: *Quæritur*, If the Husband, having acquired a considerable Estate, may he advantage his Heir or any other of the Children, and give a greater Proportion to them than the Rest? Or, Will the Conquest belong to all equally? *Ratio Dubitandi*, It were hard that the Father should not have Power to divide his Estate amongst his Children, and in Consideration of it, to oblige them to be dutiful. On the other Part, the Provision being in Favours of the Children, which is *nomen collectivum & universale*; *Indefinitum æquipollet universali*. 2*do*. If that Power were allowed to a Father, it may be abused; and intending to marry again, he may deal with One of his Children, and giving more nor his Proportion, he may, by Transaction, settle all the Conquest on him; and take a great Part of it back from him, in Prejudice of the other Children. 3*tio*. By that Provision, there is a Legitime settled upon the Children: And as the Father cannot prejudge them of that which is given them by Law, but the Bairns-part must divide equally; so he cannot prejudge them of that Bairn-part provided by Contract; unless by the same, the Father had that *arbitrium* and Power given to him, as sometimes it is.

S. WHEN a Contract of Marriage provides the Conquest to the Husband and Wife in Conjunct-fee, and to the Bairns of the Marriage; The Author inclines to think, That the Conquest would belong to all equally: And yet if there were Lands conquest, they commonly fall, *withus*, to the eldest Son, without Question. And suppose, That by the Conception of the Obligement in Favours of the Bairns of the Marriage, they may be thought to be called equally to succeed; yet since the Father hath full Power in his Life, for disposing on his Estate as he pleases; and that in all Law and Reason he should be judged the best Arbiter; his Division amongst his Children, according to his Pleasure, should hold: And so the Lords have found.

Provision in Bonds.

N. A Bond of Provision being granted by a Brother to a Sister, for a Sum to be payed to her at the next Term after the Bond, without Mention of Heirs or Assignies; but with a Provision, That if she should decease unmarried, it should return to the Granter and his Heirs: *Quæritur*, If, she having assigned the Bond, the Assignies will have Right, albeit she deceased unmarried? And what the Import of the said Provision is; Whether a Substitution, or a Quality of the Fie and a *fidei commissum*, that she should not assign but with the Burden of it?

S. I would allow her to assign for an onerous Cause; because she might have uplifted and spent it, tho' she had never married: But if she should

assign it gratuitously, and die unmarried, [illegible] should take Place: For this seems to be the [illegible]

Provisions in Charters.

N. IF Lands be disponed to be holden of the Disponer, with a Provision, That if the Vassal be Year and Day at the Horn, his Liferent shall not pertain to the Disponer; but (now as then, and then as now) shall be given and belong to himself: *Queritur, Quid Juris? Ratio Dubitandi, Dolus futurus non potest remitti*; and being *Pactum contra legem*, made to fright from Disobedience and Rebellion, the Rebel ought not to have the Advantage of it: Nor the Superior; because *remisit*: *Et quod aufertur indigno, cedit Fisco.*

IF such Pactions will bind singular Successors in the Superiority? *Ratio Dubitandi*, That they can be in no better Case than their Author; and these Pactions are *in rem active & passive*: And the Superiority being only by the Disposition and Infeftment thereupon, it is qualified with the said Provision, and cannot be transmitted otherwise than as it is *Jus affectum & limitatum.*

S. IT is ordinary for a Man to dispone Lands to be holden of himself, with a Provision, That if the Purchaser be Year and Day at the Horn, his Liferent, *now as then, and then as now*, shall be given and belong to the Purchaser himself. And the Author thinks *this* a previous Remission, and *pactum contra legem*: And that therefore it should not hold, but be taken from the Disponer, *tanquam ab indigno.* But all this is quite out of Fashion. And these Pactions will not only bind the Makers, but even the singular Successors, if that they be insert in the Charter and Sasine; which is all can be done to make them real?

Provisions in Contracts.

N. A Father being obliged by Contract of Marriage, to employ a Sum to himself and his Wife in Liferent only, and his Bairns of that Marriage in Fee; which failzieing, to his Heirs and Assignies: If Infeftment should be taken in these Terms, Whether is the Father Fiar, so as the Bairns could not succeed but as Heirs of Provision to him?

S. IF Infeftment should follow in these Terms, it cannot be thought the Father should be Fiar, if the Bairns were existing, and *nominatim* in the Infeftment: For then their Fee seems to be established, and to them equally among them. But, *What if the Sum were employed, and the Infeftment taken in the Terms of the Contract, but no Bairns nominate, and possibly not at the Time existing?* I should judge the Father in this Case, to be Fiar; and that the Bairns should succeed to him as Heirs of Provision: For in effect, this Question cannot otherwise be reasonably explicate: And it appears to be the *Meaning* of Parties.

N. IF the Fee were secured to the Children, by an Infeftment to a Trustee to the Behoof of the Children; if it be the Fee of all his Estate, and being a Merchant, and thereafter People contracting with him as a Person

Perſon of a viſible Eſtate; would the Creditors be prejudged by ſuch Proviſions in a Contract, not publick by Infeſtment upon it, or Inhibition? *The ſame Caſe.*

S. If the *Truſt* be ſettled by an Infeſtment, it makes the Contract *publick*, and ſeems to *differ* the Caſe; as no Doubt it would, even tho' the Children were not exiſting: For here the Settlement is by an Infeſtment in Implement of the Contract.

Proviſions in Favours of Daughters.

N. BY Contract of Marriage it is provided, that in Reſpect the Eſtate was entailed, the Daughters ſhould be provided, if there be One to 50000 Merks; if Two to 60000: Whereof to the Eldeſt 37000 Merks, and to the Other, the Remainder; to be paid at their Age of Sixteen Years, or their Marriage. *Quæritur*, The Father having ſurvived, and there being Two Daughters of the Marriage at their Mother's Deceaſe, of which the Elder died not long after, long before the Age foreſaid. 1*mo*, Will the Younger ſurviving get 50000 Merks, being now the only Daughter of the Marriage? 2*do*, If at leaſt ſhe will have the Portion of the Elder, being 37000 Merks? 3*tio*, If her Siſter's Portion will accreſce to her as Neareſt of Kin? 4*to*, If the ſaid Proviſions be conditional, *viz.* If they Marry, or attain to Sixteen Years? 5*to*, If the Proviſions be perſonal? At leaſt ſo far, as if after the Term they be not aſſigned, and the Daughters die, they will not tranſmit, there being no Mention of Heirs? 6*to*, The ſaid Sums not being due upon Account of *Creditum*, but of Proviſion for a Livelyhood, that they may be married, or at leaſt have a Competency to live upon; *Quando Dies cedit?* Whether after Diſſolution of Marriage, or when they attain to the Age foreſaid?

S. It is certain, that theſe Proviſions to the Daughters are not due till their ſaid Age or Marriage: And that if One of the Two die before, her Portion evaniſheth; and the Surviver comes to be the only Daughter: For theſe Proviſions are reckoned as *legata conditionalia*, where the Legatar dying before the Condition, the Legacy evaniſhes: But after either the Age or Marriage, the Portion is due, and may be aſſigned, and will tranſmit to Heirs. And this reſolves the whole Caſe, for the Diſſolution of the Father's Marriage by the Mother's prior Death ſignifies nothing.

The next Title, Publica, *is but* Latin *Citations.*

Pupils.

N. IF in Law Pupils who have neither *Velle* nor *Nolle*, may be Charged and Denounced?

S. Tho' they have neither *Velle* nor *Nolle*; yet they may be charged, and (it may be) denounced; for the late Act of Parliament frees them only from Caption.

Q.

Quartering.

N. IF there may be Quartering for Impoſitions laid on by the major Part of the Shire, though there were ground for the ſame? Answer, *Negative*, Seeing Quartering is *Remedium extraordinarium & Militare*, and cannot be uſed but where there is a Law to warrant the ſame: But in ſuch Caſes, if there be any thing done behoovefully for the Shire; Thoſe who are refractory may be purſued *actione negotiorum geſtorum*, before the Sheriff or other Judicatories, and upon Decreets the ordinar Execution may follow.

S. There ſhould be no Quartering for any Cauſe, without an expreſs Warrant in Law; and even the *major Part* of a Shire cannot burthen the *whole*, without a Warrant in Law.

Quorum.

N. IN the Caſe of Mr. *John Bayne* of *Pitcairly*, mentioned in the *Title. Diſpoſitio collata arbitrium alterius in littera* D. The Friends being ſo named, that the major Part ſhould have Power to determine; there being Three of Ten. *viz.* The *Chancellor*, Sir *John Nisbet*; and *Tarbat*, *ſine quibus non*; and in caſe of any of their Deceaſe, Sir *William Bruce*. *Quæritur*, If the Three *ſine quibus non* muſt conſent? Or if it be neceſſary only that there ſhould be a *Quorum* of the Meeting? *Ratio dubitandi*, His naming Three *ſine quibus non*, appears to be upon that Account, becauſe Two might not agree. *2do.* It were hard, if all the Friends ſhould agree but One of the *ſine quibus non* It ſhould be in his Power to evacuate the Defuncts, Will and Deſign. *3tio*, When a Commiſſion is given to Three Perſons to be Judges or Arbitrators, they muſt all be preſent, and yet if Two agree though the third Diſſent; their Sentence will be valid.

If any of the *Quorum*, *ſine quibus non*, ſhould ſettle with the Heirs, of Deſign to queſtion the Defunct's Deed. *Quæritur*, If he (as having forefaulted his Truſt) ſhould be in the ſame Caſe as if he were dead?

S. In the Caſe of a Man's naming Ten Friends to be Curators to his Eſtate, or for ſome other Effect; with Power to the major Part to determin, and Three of the Ten to be *ſine quibus non*; it appears plain that the Major Part with the Three *ſine quibus non*, has the Power, and muſt conſent; for *This* ſeems to be the Defunct's *Meaning:* And a Commiſſion to Three Perſons to be Judges, wherein Two agreeing will carry the Third, holds no Parallel.

If One of the Three *ſine quibus non*, ſhould falſify his Truſt, he ſhould certainly forfeit any Legacy left him: But yet the Truſt, as ſettled, could not proceed without him, however the Lords might ſupply it.

The Two next Titles, Ratihabitio, *and* Jus Ratium, *are* Latin *Citations.*

R.

Jura Realia in Re et in Rem.

N. *JURA Realia vel ſunt in Re ipſa vel in Rem tantum: Jura autem ad Rem interdum ſunt in Rem, perſonalia tantum ſed ad rem conſequendam, ut Diſpoſitiones, contractus, & Reverſiones ubi non ſunt Regiſtratæ.*

JURA in Re & Terris ſunt ea quæ per Saſinam competunt (nulla enim Saſina nulla Terra) ſcilicet jus Dominij (vel directi vel utilis) vulgo ſuperioritatis & proprietatis, Jus uſusfructus, & conjunctæ infœdationis, Jus Hypothecæ ſeu impignorationis, vulgo Wadſets, *Viduarum triens ſeu Tertia, Curialitas* Scotiæ *indulta maritis conjugibus, ſi uxor in terris Succeſſor aut Hæres, & prolem enixa fuerit, licet haud vitalis ſtatim moriatur: Ea enim jura viduis tam marito quam conjugi competunt, ex ſaſinis & in terris in quibus alteruter obiit veſtitus & ſaſitus, ut ex brevi patet.*

JURA autem Reverſionis & Regreſſus, moribus noſtris realia ſunt, & in Rem; ut adverſus non tantum hæredes, ſed ſingulares Succeſſores efficacia ſint; idq; haud ſua natura, cum re ipſa ſint tantum perſonalia pacta de retrovendendo: ſed moribus noſtris, ubi rite regiſtrata ſunt, etiam adverſus emptores, aut alios ſingulares ſucceſſores, rata & valida habentur; cum inſinuata iis innoteſcant, aut ſciri poſſunt.

NEC minus ſervitutes prædiorum, & conductiones ſeu aſſedationes, Jura Realia & in Rem ſunt, ſine ſaſina, ſi ante venditionem poſſeſſio accedat.

S. THIS is all very ſound, and well expreſſed.

Rebellion.

N. A Bond being aſſigned by a Rebel, and the Aſſignation not intimate before the Rebellion: *Quæritur,* Whether the Aſſigny, or the Donatar will be preferred? *Ratio Dubitandi,* That the Aſſignation denudes the Cedent; and the Intimation is not neceſſary but to exclude another Aſſigny: And the Rebel by his Rebellion, does not tranſmit, but amits and forfaults any Right that he has; which being *in nullius bonis,* is *Domini Regis*: Whereas it cannot be ſaid that the Bond was *in nullius bonis* after the Aſſignation, ſeeing it is then *in bonis Ceſſionarii.*

S. AN Aſſignation by a Rebel, tho' not *intimate* before the Rebellion, doth certainly denude the Granter, and in all good Law, ſhould be ſufficient to exclude the Donatar, unleſs he prevent the Aſſigny by *Diligence* and *Uplifting*; For *Intimation* is only to ſecure againſt another Aſſigny; But, as we make Intimation neceſſary to *complete* the Right, all this may be doubted.

Whether the Rebel's Goods ought to be liable to Creditors?

N. SEEING *Bona* are underſtood *debitis deductis*, and by the Cuſtom of all Nations, when they are confiſcate *tranſeunt cum ſua cauſa*, and with the Burden of Debts; What can be thought the Reaſon that it is otherwiſe with us? ANSWER, 'Tis thought, That ſeeing Lands, when they are forfaulted either to the King, or to the Superior, they return in the ſame Manner, *& ut optima maxima* as they were given, that Condition being implied in all Rights of Lands, That the Vaſſal ſhould be Faithful and Loyal: It has been thought, but upon Miſtake, That Moveables, and other perſonal Eſtate ſhould be confiſcate in the ſame Manner, without reſpect to Debts; whereas there is *diſpar Ratio*; Lands, as ſaid is, being given to the Superior with that Quality: Whereas perſonal Intereſts are ſimply allodial, and ought to be forth-coming to Creditors: Who, tho' they have not a Right to the ſame; yet have that Intereſt, That they are the Subject of Execution: And it appears to be unjuſt, and to obſtruct Trade, if it ſhould be otherwiſe.

S. THE Author ſays well, That the Eſcheat, being of the *Univerſitas Mobilium*, ſhould *tranſire cum onere debitorum.* And indeed there is the ſame Reaſon in the Forfaulture of Lands and Heritages; for they are abſolutely the Proprietar's, notwithſtanding of the Author's alledged Diſparity: But Rigour has introduced an ill Maxim, *That the Fisk pays no Debt.*

Recognition.

N. LANDS being wadſet for a Sum, far below the Value of the Half, with a Back-tack. *Quæritur*, If there be Ground for Recognition, if the Land hold Ward? *Ratio dubitandi*, The whole Lands are Wadſet.

S. Recognition is a feudal Delinquency and Forfeiture incurred by the Vaſſal in Ward-Lands, when he *annalzies* the greater Half of his Feu, without Conſent of the Superior: But tho' he wadſet the Whole for a Sum below the Half, the Lands will not recognoſce. And it is alſo thought, That a liferent Infeftment, not valuable above the Half, cannot be a Ground of Recognition. But in ſtrict Law and Reaſon, any Alienation, tho' for a ſmall Sum under Reverſion, or in Liferent; if the Vaſſal do wholly make over his Poſſeſſion, tho' for a Time only, ſhould make the Lands recognoſce; for by his being out of Poſſeſſion, he renders himſelf incapable to ſerve his Superior, which is indeed a Delinquency, according to the *Feudal Law.*

N. IF Infeftments of Warrandice be Ground of Recognition?

S. INFEFTMENTS of Warrandice can be no Ground of Recognition, unleſs, and until the Diſtreſs and Warrandice take effect, and that for more than the Half.

N. A Vaſſal holding Ward, giveth a Charter to his Subvaſſal, or his ſingular Succeſſor upon Reſignation, with a *Novo-damus*. *Quæritur*, If the *Novo-damus* will import a Recognition?

S. If the Reſigner had no Right, but that this *Novo-damus* be truly a new Feu, it ſhould import Recognition: But ſeeing it is only intended to clear the Subvaſſal's former Right and Poſſeſſion, it ſhould not be ſo far ſtretched.

N. A Gift of Recognition being given of certain Lands, whereupon the Donator is infeft; and thereafter another Gift being given of the ſame, in Favours of another Perſon, who is alſo infeft after the former Donator, but preveens by obtaining a Declarator upon his Gift; the former not being declared: *Quæritur*, Which of the Donators will be preferred? *Ratio dubitandi*, That the firſt Infeftment ſeems to be preferable, the Superior being thereby denuded: And on the other Part, when Caſualities and Eſcheats are diſponed; which fall *ex delicto* (as the Caſe of Eſcheats by Horning) there is no conſummate Right before Declarator.

S. When there are Two Gifts of Recognition of the ſame Lands, and the firſt Donator is firſt infeft, but the Second obtains the firſt Declarator; I would prefer the firſt Donator firſt infeft; for thereby the Superior, the Granter of the Gifts, is fully denuded. And tho' that the firſt Declarator of an Eſcheat prefers to a prior Donator; that is only becauſe, That with us, Gifts of Eſcheat are reckoned as *Steps of Diligence*, and there is no Infeftment in the Caſe.

N. Whether an apparent Heir if he diſpone, and Infeftment follow, the Lands will recognoſce? *Ratio dubitandi*, *Quod nullum eſt, nullum ſortitur effectum*: And not being infeft he cannot give any effectual Right.

S. Tho' an apparent Heir of Ward Lands diſpone, and Infeftment follow; yet there ſhould be no Recognition, the Diſpoſition being null: And yet upon the apparent Heir's After-Infeftment this Diſpoſition would convaleſce: In which Caſe, 'tis thought, it might be a Ground of Recognition: But tho' the apparent Heir *fecit quod in ſe erat*; yet ſince he was not then Vaſſal, there could be no Recognition until the Event; and the Superior's entering of the Diſponer to be his Vaſſal, ſhould not be thought a Diſpenſing with the Alienation; but rather done on purpoſe to make the Recognition take effect.

N. Minors diſponing Ward-Lands: *Quæritur*, If they may be Reponed againſt Recognition? *Ratio dubitandi*, They ought not to be Reponed againſt *Delicta*, after they are *puberes & Doli capaces*: And ſuch Deeds importing Recognition, are *Crimina & Delicta feudalia*.

S. Tho' it be a *Delictum*, for a Minor to diſpone Ward-Lands, whereby they may recognoſce; yet being only *Delictum feudale*, which the Minor falls into by *Facility*, or *Inadvertency*, he ought to be reponed.

N. A Perſon being infeft in Ward-Lands, with a Faculty and Power to the Diſponer to redeem and diſpone upon Payment of a Penny:

Quæritur, If the Disponer make use of that Power and do dispone, and if an Infeftment without consent of the Superior be taken, whether there be *Locus Recognitioni? Ratio Dubitandi*, That he is not Vassal; and the Superior has not consented that he should have, and use that Power.

S. If this Infeftment with power to *redeem and dispone* was upon Resignation, the Superior that consented to that Faculty should blame himself, unless it were only a Faculty to redeem; for then it did but reinstate the Vassal: But if the Faculty reserved, was to redeem and dispone *de novo*, the Superior's Consent leaves no Place for Recognition.

N. Lands holden Ward, being wadset for a Sum far beneath the Value of the Lands with a Back-tack: *Quæritur*, If there be place for Recognition, seeing it is intended only, that the Creditor should be secured, and the Back-tack Duty is within the Half of the Rent? Answer, It is thought, notwithstanding, that there is Ground for Recognition; seeing the whole Property is disponed, and the Vassal has only a Superiority, and is a Tenent only of the Property? And beside, the Superior has that Prejudice, that if his Vassal be Year and Day at the Horn, the Liferent of the Property will not belong to him, but only the Liferent of what is payable to his Vassal by the Wadsetter, by the *Reddendo* of the Wadset Right: and the Liferent of the Back-tack will fall to the King, and the Vassal may thereafter discharge both the Back-Tack and the Reversion; so that the Subvassal would have Right to the hail Property without the Superior's Consent.

S. This Question was considered above, *If a Wadset for a small Sum far below the Value of the Half with a Back-tack, be a Ground of Recognition?* And *de praxi*, we find not. The Author says, the whole Property is disponed, and the Disponer hath only a Superiority, and a back-Tack: But this back-Tack is truly such, as repones him to the better Half of his Rents. If the Disponer be Year and Day at the Horn, The Author thinks, That the Superior will only get the Liferent of the Wadsetter's *Reddendo*; and, That the Liferent of the back-Tack would fall to the King. But it is more propable, That the Disponer's whole Liferent would fall to the Superior, with the Burden of the back-Tack-Duty. But if the Disponer should afterwards discharge the back-Tack and the Reversion; it would indeed be a new Alienation, and make a clear Ground of Recognition: However, the Author, in the Rigour of the Feudal Law, as hath been said, is in the Right.

Redemption Heritable or Moveable.

N. Quær. IF Lands being redeemable, and an Order used, Will the Sum consigned belong to the Heir or Executor? *Ratio Dubitandi, Surrogatum sapit naturam Surrogati*; and the Defunct intended that the said Sum should be heritable, being fixed upon Land; and the Debitor had no Power to alter the Defunct's Intention as to the Condition of any Part of his Estate. It is otherwise, when the same is consigned in Obedience to a Premonition at the Instance of a Creditor. *Vide* Executry, *Quæst.* 2. *in litera* E.

In

If a Declarator of Redemption doth denude the Wadſetter, ſo that the Superior, without any farther Deed either of Renunciation or Reſignation, may infeft the Granter or Wadſetter?

If the Superior has received the Wadſetter, and has given him a Charter, bearing the Lands to be Redeemable; Will he be obliged upon Redemption, to re-enter the Granter without a Regreſs? *Ratio Dubitandi*, That the Granting of the Charter with that Quality, ſeems to import a Regreſs. Answer, It is thought, That it does not import a Regreſs; it being a Proviſion betwixt the Parties, and to be underſtood *civiliter*, that the Superior ſhould not be obliged to re-enter the Debitor, being once denuded, but upon ſuch Terms as he ſhall think fit, otherwiſe there ſhould be no Uſe for Letters of Regreſs.

S. When an Order is uſed for Redeeming of Lands, the Sum conſigned will belong to the Heir of the Wadſetter, until the Order be declared, and the Wadſet redeemed. 'Tis true, if the Wadſetter ſhould *Require*, then he loſes his Redeemable Right, and makes the Sum moveable: But this is by Vertue of the Requiſition, and may alſo, as is moſt ordinary, be provided againſt.

A Declarator of Redemption denudes the Wadſetter, and the Wadſet being held of the Superior, he ſhould be call'd in the Declarator: But tho' he were not call'd, he might, upon the Wadſetter's Renunciation or Reſignation, validly re-infeft: But if he ſhould refuſe, a Decreet or Regreſs will be needful. Yet if the Reverſion be incorporate in the Wadſetter's Infeftment, granted by the Superior; it may be thought, That the Wadſetter's Renunciation doth re-inſtate the Granter and his Vaſſal, ſince it extinguiſhes the Wadſetter's Right. And in effect, where a Reverſion is incorporated, and ſo conſented unto by the Superior; a Regreſs from the Superior is ſuperfluous: For, the Superior's Conſent to the Reverſion, can import no leſs, than that upon Payment to the Wadſetter, and his Renunciation, the Granter ſhould be in his own Place.

Order of Redemption.

N. AN Order of Redemption being uſed, May the Uſer paſs from the ſame, the other Party being unwilling?

An Order of Redemption being begun by Premonition at a certain Time to receive the Money contained in the Reverſion, and before the Term the Perſon premoniſhing being deceaſed: *Quæritur*, If his Heir, being ſerved before the Time, may proſecute and complete the Order by Conſignation? *Ratio Dubitandi*, Premonition may ſeem to be perſonal: And *è contra*, the Heir is *eadem Perſona*; ſo that the Premoniſhed is not concerned, whether he receive the Money from the Perſon himſelf, or his Repreſentatives.

S. If a Man uſe an Order of Redemption, it ſeems it may be paſt from at his Pleaſure, even tho' it had been accepted: For this Order is but an *Offer*; from which, tho' accepted, the Offerer may reſile.

A Debitor premoniſhing to receive the Money at a certain Day, but dying before the Day come, his Heir entering, may proſecute the Premonition, and complete the Order: For tho' the Procuratory of Premonition would have died with the Debitor; yet the Premonition being made, no Doubt, *tranſit ad hæredem*.

Reductions.

N. WHEN a Right is reduced *ex capite* [illegible] vention, or upon any other Ground, so that the Infeftment whereby the Disponer was dis-seased is taken away: [illegible] Disponer must be re-seased? *Answ.* *Dubitatur*, because [illegible] tion he is reponed, as if he had [illegible] Part, *Dissasina* being *facti*; *quod* [illegible] And when Wadsets are redeemed, albeit the Right [illegible] tinct by a Decreet equivalent to a Reduction, yet the Redeemer must be re-seased.

AFTER Redemption, what Way should the Redeemer be re-seased? Whether upon the Resignation of the Party infeft upon the Wadset; or what other Way? ANSWER, Wadsets were of old granted [illegible] Reversions not contained in the Body of the Right, and then the Disponer was in use to get a Regress, whereupon the Superior did re-enter him: but now the Reversion being in the Body of the Right, the Disponer is in the same Case, as if he had a Regress, and should be infeft in the same Manner: The Wadsetter being denuded by the Decreet, he has no Right in his Person to resign; and therefore it is thought, that the same Course should be taken, both in the Case of Redemption and Reductions, as formerly, when Regresses were in use.

S. WHEN a Right is reduced on the Head of *Minority*, *Circumvention*, or any other Ground, the Sasine thereon falls with it; so that the Reducer needs not be re-seased, since the Disposition and Sasine, whereby he was dis-seased are *extinct*, and evanished. And the Case differs from that of a *Declarator of Redemption*; because the Reduction reduces, *tanquam ab initio*, which the Declarator does not.

THE Author repeats the Question, What Way, upon Redemption and Declarator, the Redeemer should be re-seased, and *says well*, That when the Reversion is in the Body of the Right, and so consented unto by the Superior, there is no need of a Regress; But the Superior should be call'd and decerned in the Declarator: And it may be thought, that a simple Renunciation registered, is enough to repone the Person redeeming; for the Superior can never disown, more than if the Wadset had not been granted, since now it is outquit and renounced.

Reduction Ex capite Fraudis.

N. IF a Reduction be pursued of a Right as Fraudulent, may not the Defender alledge, that the Disponer had *Bona*, either Moveables or others equivalent to the Debt, which may satisfy the same; and offer to satisfy the Pursuer upon an Assignation of the Debt due to him; to the effect he may have Recourse against the said other Estate of his Author? ANSWER, It is thought, the saids Defences would be relevant, and Assignations could not be denied.

S. IF the *Defender* in such a Reduction should either prove the *Disponer* had sufficient Estate, *aliunde* to pay the *Reducer*, or should offer himself

himself to pay the *Reducer*, on an Assignation to his Debt: *Neither* could be refused, for here all Fraud is purged.

Infeftment after Reduction.

N. A PERSON having disponed Lands and resigned, and being so divested by Charter and Sasine, if he should thereafter reduce the said Rights *Quoad hæredes*, he may be assoilzied, seeing the Right was not *Jure nullum sed annullabile*, and the Sasine and Resignation that divests is *Factum quod potest fieri infectum?*

S. A Person, tho' totally denuded by Resignation and Sasine; yet if he reduce the Rights made by him *tanquam ab initio*, needs not be reseased: For tho' the *Factum* of the Resignation and Sasine, *non potest fieri infectum*; yet when declared null in Law it is *tanquam infectum*; and there seems nothing wanting, but some proper Record to notify the Reduction.

Reduction Ex capite Metus.

N. Quær. IF Rights being made *dolo vel metu*, and upon these Heads or *ex capite Lecti* being reducible; and such Actions being *in rem*, a singular Successor acquiring a Right from the Person liable to such Actions, will he be in the same Case as Persons acquiring from Confidents? *Ratio dubitandi*, Acts of Parliament are *strictî Juris*, and cannot be extended.

S. A Right being reducible, *ex capite Lecti, aut doli, aut metus*: This Reduction may be intented against; and will affect a singular Successor: For here, *Resoluto jure dantis, Resolvitur jus accipientis*: And this singular Successor is not in the Case of an Acquirer from a Confident, against whom, by the Act of Parliament, Reduction in Defraud doth not militate, as against the Confident.

Note, *That in the civil Law, there was a Distinction betwixt the Case of* Dolus *and that of* Metus, *as to a singular Successor; for only* Actio Metus Causa *was in* rem scripta.

Reduction upon Minority.

N. IF Interlocutors *in Jure* against Minors may be reduced *ex capite Minoris Ætatis* and Læsion? ANSWER, *Negative*; Seeing Minors cannot be restored, but where either there is *Captio* by the Deed of another to their Prejudice; or by their own Deed, through their Facility; or where there is an Omission of Defences: But where Defences are not omitted, and being proponed and advised are repelled as not relevant, The Interlocutor, which is the Deed of the Judge, cannot be reduced but upon Iniquity.

S. It is thought, That [illegible] there is no Defence *omitted*; but [illegible] cannot be reduced upon Minority & Lesion, because it is the Deed of the Judge. But, what if the Interlocutor were pronounced by an inferior Judge, it were hard not to restore [illegible] pened even before the *Lords*, That an Allegeance [illegible] pelled; and that yet afterwards [illegible] appeared, specially even to the Lords [illegible] it seems the Minor's Relief should be more [illegible] Justice) than the Pupil's [illegible] not, in any Case, [illegible] nor is lesed by the Interlocutor of an inferior Judge, he hath a Remedy by Reduction; and in the Omission thereof [illegible]

Reduction Ex capite Lecti.

N. A FATHER having acquired a Right to his eldest Son, of certain Lands, reserving his own Liferent, and a Power to dispone *etiam in articulo mortis*: And thereafter having on Death-bed made use of the said Faculty, and disponed the said Lands to a second Son, *Quæritur*, If the said Right may be questioned by Reduction *ex capite lecti*, as being made in prejudice of the Heir? *Ratio Dubitandi*, That the said Disponer could not do any Deed then, in prejudice of his Heir; And on the other Part, that the eldest Son, having accepted the said Right with the said Provision, cannot question the same. 2*do*, The Heir is not in this Case to be considered as Heir, but as *quilibet*, seeing he is not in the Case of an Heir succeeding in a Right as Heir, seeing the Right was not in the Person of his Father: and he himself was Fiar with the Quality foresaid. 3*tio*, The *Law of the Majesty* is only in the Case of Rights granted to a Person and his Heirs simply; and the Reason of the Law is express, that the Defunct, when he was in Health having had no Thought to dispose of his Heritage, when he grants Rights on Death-bed of the same, is presumed to have been imposed upon, or that the said Rights on Death-bed were Elicite, or granted by him in *Delirio & fervore passionis instantis*: Whereas the said Faculty, being reversed in the Right, argues the Father's Intention *ab initio* if he should think fit even then *etiam in articulo*, being *sedati animi*. Nevertheless the said Right was reduced.

S. When a Man acquires, or by himself dispones (for *perinde est*) the Right of certain Lands to his eldest Son, reserving his own Liferent and a Power, to dispone *etiam in articulo Mortis*; the Author inclines to think that he may exerce this Faculty on Death-bed to the Prejudice of his eldest Son: But the Lords justly found otherwise, the Reservation in this Case against his apparent Heir being against Law, *et nemo potest providere ne leges in suo Testamento valeant*: But if a Man should dispone to a Stranger with the like Power reserved, he might then freely exerce it on Death-bed; because the Heir's Interest is here cut off by the first Disposition in *hinc ponitur*; and the Receiver of the Disposition cannot quarrel the Condition thereof: And farther, 'tis thought, that tho' the apparent Heir should acquire from the Receiver of the said Disposition; yet the Condition of it would, even in that

Case,

Case affect [illegible] the Condition of his Author's [illegible]

A [illegible] Power to dispone to [illegible] Revoke, and [illegible] afterwards sicken, [illegible] another, in Fee, [illegible] bought, That [illegible] revived, and to become [illegible] Doing he might have [illegible] would have held, [illegible] Reversion, it seems to be well enough [illegible] Power cannot be exerced without a tack [illegible], would be quite frustrate.

Redeeming after Redemption.

N. IF Wadsetlands be holden of the Superior, and the Reversion be contained in the Charter; If the said Reversion be not equivalent to a Regress, in respect of the Superior's Consent to the same? And what Way the Vassal may be relieved upon the Redemption, especially if the Creditor be dead; and his apparent Heir will not grant a Renunciation, and cannot be forced? ANSWER, The Superior may be urged to grant a Charter, making Mention of the Wadset, Redemption and Declarator, and by Law, That he is liable to reinvest the Vassal having redeemed.

S. THE Case here, is just what is above resolved; That a Reversion incorporated with the Superior's Consent, implies a Regress: And tho' the apparent Heir of the Wadsetter should refuse to grant a Renunciation; yet a *Declarator* will supply it.

The next Title, Regalia, *is but a few Citations.*

Regality.

N. IF Rights of Regality imply and import a Right to Escheats upon Horning, albeit they be not express thereanent? *Ratio Dubitandi,* It is the common Opinion, That they are implied. *Ex adverso,* Gifts of Escheat upon Rebellion are *inter maxima Regalia,* and Rights of the same are *stricti Juris.* 2*do.* All Letters of Horning bear, That the Rebel's Goods should be escheat, and brought in for His Majesty's Use 3*tio.* Regalities being Privileges of Jurisdiction, and Exemption from the ordinary Courts of Shires and Justices, carry only such Escheats as are incident to Jurisdiction; as Mulcts and Fines of Persons unlawed, or sentenced in Courts of Regality. 4*to.* Declarator of Escheats cannot be pursued before Regality-Courts, but only before the Session. 5*to.* In other Cases of Escheats, upon account of Crimes or *Delicta*; as for Theft, Slaughter, &c. the Crime is not against the King directly, but consequentially, as concerned in the Loss of a Subject. But Rebellion on Horning is directly against the King. It will be fit to see the Right of an ancient Regality.

Suppose that the Lord of [illegible] ning; Will he have Right only [illegible] Territory; or to all the Rebel's [illegible] Regalities of others?

S. It is a Right of Regality [illegible] the King, but for such as hold [illegible] the King being the Fountain of [illegible] Bounds, whether they hold immediately [illegible] gate and give that Jurisdiction [illegible] hold of himself, or not. And on [illegible] being annexed to the Lands, and [illegible] that a Vassal should be above his Superior, [illegible] may be, Baron, a Right of a Barony-Jurisdiction cannot be given *in eadem Baronia*; and far less of a higher Jurisdiction. And no Right can be given to a Vassal in relation to his Lands, but such as would pertain to his Superior, if the Lands came in his Hands by Non-entry, or otherwise: And the Right of Regality, which did never pertain to the Superior himself, cannot come in his Hands by Non-entry, or otherwise.

S. 'Tis commonly thought, That a Regality doth imply and import a Right to Escheats upon Horning: And the Reasoning in the Contrary, is more subtil than solid; except that Regalities in effect should not only be restrained, but totally discharged.

The Lord of Regality having Right to an Escheat upon Horning, will have Right to all the Rebel's Moveables, tho' without his Regality: For *Mobilia sequuntur personam.*

If a Right of Regality should be granted, not only for Lands holden of the King the Granter; but for such as hold of another Superiour: It is thought, This would be held for an absurd Novelty: For it is but too much, That Regalities should be granted, even for the Receiver's own Lands holden of the Sovereign.

Writs Registrate, that cannot be found in the Register.

N. IF it be evident that a Writ was put in the Register, and yet cannot be found, neither Principal nor Booked; *What Remedy?*

S. The best Remedy would be, a Law in that Behalf; and the Case well deserves it.

Registratio.

" *N.* APUD nos Instrumenta, aut Literæ Registrari dicuntur, cum " referuntur in Regestum sive Librum publicorum, vel Actorum " vel Monumentorum. Registratio autem celebratur duobus modis, & ad " diversos fines & effectus.

" Uni

" [illegible] fcili-
" cet [illegible] licet
" [illegible] fit
" ufivis, &c. [illegible] virtute
" clauſulæ Executive & Registrationis (quæ [illegible] omnibus fere in-
" ſtrumentis [illegible] pro majori
" ſecuritate [illegible] volumus & consentimus
" ut præſens Instrumentum inseratur & Registretur in Libris Concilii
" aut Sessionis, Quatenus sufficiat unicum [illegible] sententiæ
" Dictorum Judicum, ut literæ Denunciationis & Commissionis (ut
" Præfici loquuntur), continentes fundamentum dictarum & alia necessaria
" (ut par est) pro ea exequenda dirigatur; & constituimus
" aut eorum
" quemlibet Procuratores nostros ad effectum præmissum.

" Sic sine lite & processu, ad ultimum processus metum & exitum de-
" venitur, sententiam scilicet & Executionem omnimodam; fictione e-
" nim brevis manus ad præsumptam & sententiam requisita quodam-
" modo insunt. Vice enim Citationis (quæ supervacua est ubi partes
" præsto sunt & consentiunt) procurator etiam Rei intervenit, dicis
" causa, & consentit; Judex etiam secundum Instrumenta exhibita per
" procuratorem, eoque postulante ut juxta clausulam prædictam, ad ef-
" fectum prædictum in Registrum referantur, decernit. Actuarius etiam
" & Clericus Curiæ decretum seu Extractum expedit,

" Illud autem tribus partibus constat. *1mo*, Enim præmittitur de-
" cretum eaque sequitur forma, *Edinburgi* die Mensis 16
" Coram Dominis Concilii & Sessionis comparuit, *T. W.* Advo-
" catus procurator pro *D. P. W.* Obligato in Chirographo infra scripto,
" & exhibuit dictum Chirographum, petiitque illud inseri & Registrari
" in Libris Concilii & Sessionis ut vim sententiæ dictorum Dominorum
" obtineret ei interponendam; qua literæ Cornuationis & aliæ necessa-
" riæ desuper dirigantur modo infra specificato; quam postulationem
" dicti Domini Rationi consonam judicarunt, ideoque ordinavere & or-
" dinant Dictum Chirographum inseri & Registrari in libris dictæ curiæ,
" & decrevere illud obtinere vim sententiæ ipsorum, & Literas Cornua-
" tionis & alias necessarias inde dirigi modo infra-scripto. *2do*. Subjun-
" gitur Tenor ipsius Chirographi. *3tio*. Sequitur Clausula ista *viz*. Ex-
" tractum de libro actorum per me. *viz*. Vel Dominum Rottulorum
" Clericum Registri, vel ejus Deputatum Clericum. qui subscribit nomen
" suum.

" Instrumento autem Registrato, autographum seu originale a Cle-
" rico retinetur in publica custodia; Exemplari (ut superius diximus)
" Extracto & Creditori dato, ex quo executio sequitur tam realis quam
" in personam: nec absimile est illud Extractum Instrumento Guarenti-
" giato, cujus sæpe mentio habetur tam apud Jurisconsultos quam Pra-
" cticos; ex eo enim, non minus quam ex sententia solenni, Executio
" parata est.

" Cæterum omnis definitio in Jure periculosa est, & Juris remedia
" etiam optima interdum remedio indigere videntur; nec Registrationis
" saluberrimo instituto sutum deesse videtur incommodum: Instrumenta
" enim cum in publica custodia sint, Incuria Clericorum, aut servorum
" fraude facile intercidunt aut subtrahuntur; ea autem perdita esse sub-
" odorati debitores aut eorum hæredes, actione Falsi (eam Improba-
" tionem dicimus) intentata, sæpe liberantur; nulla judicis sed summa
" actoris & reapse injustitia. In causa enim Falsi agitur, ut exhibeatur
" Instrumentum de quo quæstio est; ea, in libello, comminatione (seu

" vocare) in eis confidere ut Collegæ haud erubuerant, [illegible] fecerunt. In-
" strumentum ipsum [illegible] quidem [illegible] reddendum ut penes eum remaneret.
" Registratio enim cum sit actus voluntarius, [illegible] tempore etiam [illegible] explicatur, non tantum [illegible] sed nec
" ullo alio fundamento nititur nisi [illegible] partium, [illegible] Regi-
" strationis in instrumento ipso inserta; [illegible] penes Credi-
" torem remanente nec in custodia publica [illegible] conservato sententia esset ina-
" nis sine ullo probationis adminiculo quod in actis sit. Adhæc, eadem
" & majora sequerentur incommoda; sæpe enim non [illegible] ejus penes
" quem Instrumentum est, sed aliorum interest ut servetur, [illegible] forte
" hæredibus. Taliæ & Provisionis ita dispositis ut [illegible] fiat gravius Sub-
" stitutionum: eo, & multis aliis casibus tutius esset & æquius, Instru-
" mentum illud in publica custodia esse, ut sic omnibus quorum interesti
" consultum sit, quam Instrumento penes unum retento, ejus negligen-
" tia vel dolo reliquorum jus periclitari.

" PRÆTEREA Creditore, penes quem Instrumentum est, decumbente,
" & cum debitore suo colludente (ut id genus hominum fallax est) facile
" esset illudere creditoribus suis, qui instrumentum istud per adjudicati-
" onem sibi addici obtinuerunt; Instrumento in causa Falsi contra in-
" tentata, haud exhibito.

" Mihi autem in isto recessu, & unice fatigenti, quomodo prodesse
" utcunque possim, videtur; omnibus quorum interest consultum fore,
" & incommodis & commentis, quæ ultro citroque adduci possunt, ob-
" viam iri, si tempore confectionis instrumenti ejus copia aut exemplum
" describatur, ab eo qui instrumentum ipsum scripserat, & ei subjiciatur
" breviculum seu brevis nota ab eodem scriptore scripta, iisdem partibus
" & testibus subscribentibus, & ejusdem datæ; eo qui sequitur aut simi-
" li tenore,

" Nos verò (obligati scilicet in instrumento) agnoscimus copiam supra-
" scriptam, & verum esse & integrum exemplar instrumenti seu contra-
" ctus inter nos confecti, ejusdem datæ & tenoris; & volumus & consen-
" timus, ut virtute clausulæ Registrationis in dicto contractu insertæ, nec
" non virtute præsentium, ut prædictum instrumentum coram Curia ex-
" hibitum, in libris Curiæ registretur, habiturum vim ad effectum supra-
" scriptum; Nec non volumus & consentimus, quod extractum præsti
" instrumenti in omnibus causis, etiam Falsi & Improbationis exhibitum
" una cum isto breviculo, sufficiens erit & efficax ad omnes effectus,
" haud secus quam si instrumentum ipsum exhiberetur, aut productum,
" satisfaceret.

" REGISTRANTUR instrumenta non tantum executionis sed custodiæ,
" causa & ad futuram rei memoriam; ut plerumq; fit in Acceptilatio-
" nibus & Apochis, quando concedens ad nil faciendum obligatur, ideo

" ut

" ut executione fiant quæ firi; ne tamen intercidant, conſentit ut ad fu-
" turam rei memoriam, in libris Actorum inferantur & asſervantur.

" Registrantur etiam Inſtrumenta nec Executionis nec cuſtodiæ
" ſed Inſinuationis ergo; idque ſumma ratione & neceſſitate nedum uti-
" litate; unuſquiſque enim ſcire debet conditionem ejus cum quo con-
" trahit juxta Regulam Juris.

" Id autem ſcitu difficile eſt, iſto tempore Candoris & Bonorum Mo-
" rum effœto, Fraudis autem feraci; ſæpe enim eveniebat ut compara-
" tis prædiis ut optimis maximis, nec citra juſtum & maximum pretium,
" emergerent qui ſibi Jus in iis vindicarent, vel Dominii vel Retractus
" ſeu Reverſionis; ſic iis vel evictis vel modica pecunula redemptis
" Emptor deluſus tam Terris quam pretio carebat, actione adverſus
" venditorem plærumque inopem prorſus inani. Scire igitur expedit
" conditionem rei, de qua contrahitur, an ſit penes Diſponentem & pe-
" nitus ſua, nec aliena ſit vel Jure Dominii, nec Hypothecæ nexu aut
" annui reditus aut alio onere gravata; aut Retractui aut Reverſioni
" obnoxia: Nec minus cognitu neceſſaria eſt conditio vendentis aut al-
" terius contrahentis, licet enim dominus ſit, & Dominium ſit, Poteſtas
" de re ſua diſponendi: Juxta regulam juris, *Quilibet eſt rei ſuæ arbiter*;
" ſubjungitur tamen iſta regula, *Niſi lex obſtet*. Lex autem obſtat do-
" minis, ne de rebus & terris ſuis liberè diſponant, legum vinculis fortè
" præpeditis; Inhibitione ſcilicet, quando in rem & ad inſtantiam credi-
" torum inhibiti ſunt; aut in rem ſuam & ſuorum hæredum, iis bono-
" rum ſuorum adminiſtratione interdictum eſt: aut quando rebelles de-
" nunciati ſunt & exleges: de quibus impedimentis alibi ſuis locis diſſe-
" ruimus.

" Ut autem incommodis, ex ignorantia tam conditionis rei, quam
" perſonæ obviam eatur, utq; conditio utriuſq; innoteſcat, plurimis con-
" ſtitutionibus & legibus cautum eſt.

In a Diſpoſition may be regiſtrate, the Diſponer being on Life, but the Receiver being deceaſt: *Ratio Dubitandi*, Regiſtration is to the Effect it ſhould have the Force of a Decreet; and there can be no Decreet in Favours of a dead Perſon.

§. In this *Latin* Exerciſe, the Author points at a Remedy for the *Doubt* propoſed in the laſt Title; and it plainly reſolves in *an attested Double of the Writ regiſtred*. But the *eaſier* Remedy would be, if, according to the Uſe of Bills of Exchange, or of Bills of Ladening, there ſhould be Two or Three Principals of every Bond, and the ſame marked with a *Note*, That *One* being payed, *All* is ſatisfied. But this would likewiſe be a great Trouble in long Diſpoſitions, or Contracts of many Sheets. And ſtill ther's nothing without Hazard: Yet Two or Three *Principals* cannot but be a probable Remedy againſt the Loſs of *One*.

There's now no Difficulty, but that a Writ may be regiſtered, tho' the Creditor be Dead: *W.* & *M.* Par. 11. Seſſ. 4. Cap. 15. And ſo, if the Granter be dead: Seſſ. 6. Cap. 39.

The next Title to this, Regum Contractus, *is but Citations.*

Relief of Cautioners.

N. IF Cautioners finding the Principal to be in a worſe Condition, may purſue for Relief, before Diſtreſs; at leaſt, to be ſecured out of his Eſtate?

S. A Cautioner fearing the Constitute
Diſtreſs, *Inhibit or Arreſt*: And the Cha
left hand, may alſo in it's true Import, be
Diſtreſs, and oblige, at leaſt to find Caution
a Ground to adjudge; it ſeems to be as juſt as
randice.

Relocation.

N. A Tack being ſet, and the Setter deceaſed: *Quæritur*, After his Deceaſe, and no Perſon being Heir to him, the Tacksman may be ſaid to bruik *per tacitam Relocationem*; ſeeing there is none that can be ſaid to be *Relocans?*

S. Tho' the Setter of a Tack be deceaſed; yet the Tacksman may continue to poſſeſs, after the expiring of the Tack, *per tacitam relocationem*; *quæ, fictione juris, obtinet in favorem bonæ fidei poſſidentis, etiam ſi nullus ſit qui relocare poſſit.*

Reluitio ſeu Retractus.

N. *INTER juris interpretes celebris eſt controverſia de Jure reluendi, ſeu Retractus, quod apud nos* Reverſio *dicitur; An ea præſcribi poſſit? qui affirmativam tuentur Regulam; qui negativam, Exceptionem, ſententiæ ſuæ fundamentum adducunt: Regula eſt*; Omnes actiones, omnia jura etiam maxime longæva, longiſſimo tempore; *id eſt*, ipſo quadraginta annorum præſcribi & extingui: *Exceptio eſt*, Ea quæ ſunt meræ facultatis, haud præſcribi. *Apud nos, lis iſta ſopita eſt: Conſtitutione trium Regis*, Jacobi *VI. Act. Parl.* 12. 1617. *Cavetur, omnia jura contractus, & inter alia Reverſiones & Retractus; & ex iis actiones, 40 annis præſcribi; exceptis reverſionibus quæ ſunt in corpore juris, & inveſtituræ excipientis; & iis etiam quæ inſinuatæ & in archiva publica & regiſtra relatæ ſunt: quibus caſibus (cum nulla ſubſit ſuſpicio falſitatis, ut aut lex iſta) actiones ex iis ſtatuitur eſſe perpetuas. Sed cum contractus, chirographa ſeu obligationes præſcribantur, licet inſinuatione publica, & in archivis ſint, Qui fit, ut ubi eadem & par eſt ratio, diſpar jus ſit?*

S. Here the Author again moves the Queſtion, Why Reverſions regiſtred preſcrive not, tho' Bonds regiſtred do preſcrive? But as to Reverſions, *ita lex ſcripta eſt*, 1617: And of Neceſſity, they muſt be regiſtred: Whereas the Regiſtration of Bonds is arbitrary, and ſo cannot be a ſure Notification. *Vide* Preſcription.

Remiſſions.

N. IF the Exchequer, when Remiſſions are not given by the King, may grant Remiſſions *ſine cauſæ cognitione*, upon a Deliver of Slains?

Q. Remissions can be given for Murder? Answer, The King's Power is not limited; But in this Case, Remissions cannot be given but in the Cases that by the Divine Law, and Law of Nations, the Benefit of the Sanctuary may be competent; Whereas by Act of Parliament, there is no Sanctuary for fore-thought Felony.

S. Remissions for *Slaughter* were not in use to be granted by the Exchequer; and even when granted by the King, there should be a Letter of Stains; and yet, the Affithment configned.

The Author lays well as to Remissions for Murder, That the Divine Law, and Law of Nations should regulate that Point; which is most just.

Renunciation.

N. Quær. If the Father or his Executor may urge the Daughter who has renounced to confirm her self Executrix to her Mother, to the Effect her Renunciation may be effectual? *Vide Neareſt of Kin. Queſt. 4ta, Litera K.*

S. There appears no Neceſſity for this, ſeeing her Renunciation excludes her, and the Procurator fiſcal may do the Buſines.

N. If a Man have a Son and Two Daughters, and both the Daughters renounce all Executry, Debts, Goods, and Gear whatſomever, either provided to them, or which may fall or pertain to them by the Deceaſe of their Father or Mother: *Quæritur*, If the Son will be both Heir and Executor?

S. Where there are a Son and Two Daughters, and the Daughters renounce all Benefit by the Deceaſe of Father and Mother, the Son, tho' Heir, my be alſo Executor: And there can be no Doubt of it.

N. If a Perſon charged to enter Heir and renouncing, may notwithſtanding be ſerved Heir? Answer, He may be ſerved: and no other Perſon or Creditor can oppoſe, upon Pretence of the Renunciation, ſeing Charges to enter Heir are Perſonal Diligences as to the Charge only: and Renunciations in obedience thereto do militate only in favours of the Chargers.

If the Charger may oppoſe? Answer, If he has any Prejudice or Intereſt he may oppoſe; but it is thought he can have none, ſeeing notwithſtanding of the Service, what is done upon the Charge or Renunciation will be effectual; and the Renunciation is *actus involuntarius* for Obedience; and with us there is not *Locus ſucceſſorio Edicto*. And it were hard if *Hæreditas* ſhould be *Opulenta* that the Heir could not Enter.

S. A Perſon renouncing to enter Heir, may afterwards ſerve at his Pleaſure; and the Perſon who charged him to enter cannot oppoſe, ſince he has no Prejudice by it, as to his Diligence.

THE Two next Titles, Renunciatio Jure Publico, *and* Res Fiſcales & Res privatæ Regis, *are* Latin *Citations*.

Reſervation in Favours of Relicts.

N. A RIGHT being granted to be holden of the Superior, and after Infeftment, being reduced *Ex capite dati vel retenti*. *Quæritur*, Whether the former Right revives, or if there muſt be a new one; what Way is it to be taken? *It is Anſwered*, That it is thought, that the Saſine being taken away, and being fatal, which cannot be refected, there muſt be a new Saſine; and the Superior is to be dealt with to give a Precept making Mention of the former Saſine and Diſcharge of Reduction; and that he is willing to receive again the Diſponer.

If the Diſponer be deceaſed, *quomodo* ſhall his Heir be infeft? Answer, Being ſerved Heir he may apply to the Superior, for a Precept mentioning as ſaid is, and that he is Heir.

If the Lands be holden of the King, what Courſe ſhould be taken? Answer, upon Application to the Lords by Bill, they may grant Warrant to the Directors of the Chancery, to give Precept of the Nature foreſaid.

If the Superior may be forced to receive his former Vaſſal in the Caſe foreſaid? And if he ſhould, will Compoſition be due? Answer, It is thought, that he ought to receive him but upon Compoſition; ſeeing having once entred his Vaſſal, he is not obliged to re-enter, but upon Compoſition.

S. We had this before. And 'tis ſtill thought, That the Reduction not only reduces, but likewiſe repones: Only a Record for Information may be deſiderat. And the Diſponer in this Caſe having reduced, is underſtood in Law to be ſtill infeft; nor doth there appear a Neceſſity, in Caſe of Lands holden of the King, to be infeft by the Directors of the Chancery.

Reſervation in Favours of Relicts.

N. BY Contract of Marriage, a Lady having accepted a Liferent provision, in Satisfaction of all ſhe could claim, either of Terce or Moveables, excepting and reſerving the Third of the Pleniſhing of the Houſe: *Quæritur*, Whether by the ſaid Reſervation ſhe has a Right ſettled in her Perſon to the Third of the Pleniſhing, free of Debt and moveable Heirſhip? Or if the ſaid Third be only underſtood of free Gear, the Debt being paid, and Heirſhip deduced? *Item*, If the ſaid Third be liable to a Bairn's Part, if all the Executry be exhauſted but the ſaid Third?

S. It is above reſolved, *Tit. Pleniſhing*. That when in a Contract of Marriage the Wife accepts in Satifaction, reſerving the Third of the Pleniſhings, that it is ordinarily done by Way of Diſpoſition; and alſo with a Clauſe, *without Deduction of moveable Heirſhip*, which, in Effect ſeems to be implied. And if the Reſervation were yet more ſimple, *of the Third of houſhold Pleniſhing*; 'Tis thought, it ſhould imply a Diſpoſition; and that without Deduction of either Debt, Bairn's Part, or moveable Heirſhip; ſince a Diſpoſition in a Contract ſhould be underſtood favourably, and theſe Deductions do only afterwards emerge.

Reſig-

Resignation.

N. IF a Superior, who is a ſingular Succeſſor, may infeft upon a Reſignation in his Author's Hands, as upon a Compriſing the Time of his Author's Right?

If a Superior has given a Charter upon Reſignation, whereupon there is no Infeftment; *Quæritur*, If he be denuded of the Superiority; Will the ſingular Succeſſor thereof be obliged to renew the Right, and to grant Precepts to that Effect; and by what Action he may be urged?

S. RESIGNATION being made in a Superior's Hand, his ſingular Succeſſor coming in his Place, may expede the Infeftment upon it. And if a Superior has given a Charter upon Reſignation made in his Hands; tho' he be denuded before Infeftment; yet *his* Precept will be good: But if the Charter contain no Precept, the ſingular Succeſſor cannot be compelled to ſupply it.

N. Quær. If after Reſignation, the Diſponer and the Perſon in whoſe Favours the Reſignation is made, may agree, and recede from their Bargain without Conſent of the Superior, upon Pretence that the Reſignation is *in favorem*; and every Perſon may renounce *Jus pro ſe introductum*? *'Tis thought*, They cannot; & *res non eſt integra*, there being a *quaſi contractus* betwixt the Superior and them.

S. 'TIS thought, That after Reſignation made, the Reſigner and the Perſon in whoſe Favours it is made, may recede from the Bargain, without the Superior's Conſent: For, any *quaſi-Contractus* betwixt the Superior and them, is all *in favorem*, and may be paſt from.

N. IF after Reſignation accepted, the Superior be denuded; Whether his Succeſſor will be obliged to infeft him? And what way he may be urged? *'Tis thought*, That *ſuccedit in rem cum ſua cauſa*: And upon a Bill to the Lords, there may be a Warrant to direct Precepts, as upon a Retour.

S. 'TIS above ſaid, That if the Superior be denuded after Reſignation accepted, his ſingular Succeſſor cannot be compelled to perfect it: For his Predeceſſor's Acceptation was a mere perſonal Deed.

N. IF an Inſtrument of Reſignation *in favorem*, will prejudge a ſingular Succeſſor, ſeeing it is not regiſtrate?

S. AN Inſtrument of Reſignation *in favorem*, being an incomplete Deed, cannot prejudge a ſingular Succeſſor to the Reſigner: But an Inſtrument *ad remanentiam*, would prejudge; and therefore is ordained to be regiſtred.

De Resignationibus.

Quæstio Prima.

An Resignatio in manibus Domini Superioris, alienantem penitus devestiat?

" *N.* ALIENATO prædio, & ex Mandato in Instrumento Aliena-
" tionis inserto, Resignatione subsecuta, & a Domino directo
" admissa: *Quæritur*, An ea alienantem ita devestiat, ut nullum juris ve-
" stigium penes eum supersit; nec, eo mortuo aut delinquente, custodia
" hæredis minoris, aut Maritagium, vel alia emolumenta Domino dire-
" cto obveniant?

" *Respondere visum est*, Alienantem penitus devestitum, & Dominio u-
" tili exutum, nec ex ejus obitu vel delicto, obventiones (quæ sunt Do-
" minii directi fructus) deberi Domino directo; omnia siquidem, quæ
" vasalli ut devestiantur facere solent aut debent, rite peracta sunt: nec
" obest, quod uniu[illegible] interitus est alterius ortus, nec jus proprietatis & Do-
" minii directi a [illegible]mino discedit, nisi alii acquiratur: dici autem nequit
" emptorem, aut eum cui alienatio facta est Dominum aut Vasallum es-
" se, antequam a Domino directo juvestitus & sasitus sit: Jus siquidem
" nedum ad rem, per alienationem quæsitum est ei in cujus favorem Re-
" signatio facta est, sed tantum non in re; & inchoatum eatenus, ut feu-
" dum sit penes Dominium directum, quasi per fideicommissum, & in
" rem ejus cui alienatio facta est; ita ut eum ejusq; hæredes investire te-
" neatur: & in jure, *Quod prope est, multis casibus idem censetur.*

Quæstio Secunda.

An ex Persona Resignatarii, & ejus vel obitu vel delicto, Custodia Hæredis & alia emolumenta Domino directo obveniant?

" *N.* SI post Resignationem a Domino directo admissam, nihil commo-
" di ei obvenit vel ex obitu vel delicto alienantis, quia Vasal-
" lus esse desiit, *Quærendum*? An saltem ex obitu vel delicto ejus
" cui Alienatio facta est, custodia & Maritagium hæredis, ususfructus ex
" Rebellione per Annum & Diem, aliæque obventiones ordinariæ & so-
" lennes ei cedant quæ debentur cum Vasallus vel moritur vel deliquit:
" nec Vasallus dici potest, quia nunquam sasitus fuit; Juxta tritum illud,
" *nulla Sasina nulla Terra:* Verius tamen & Jure consentaneum vide-
" tur, eo tempore quo per Resignationem, Terræ sunt in manibus Do-
" mini superioris, Jus & Dominium directum haud sterile & effectum
" esse: & ejus fructus ei haud negari debere, isto colore vel captione,
" quod alienans devestitus Vasallus esse desiit, Emptor autem nondum
" Vasallus est: nam si Domino nec renuente nec cunctante, per eum

non

" non ſtet, quod nimis Emptor inveſtiatur Emtore præmortuo vel negli-
" gente, vel ſuo vel ejus negligentiæ imputandum quod Vaſallus non
" fuerit & inveſtitus: Neque enim de Domini commodo agitur, pro
" inveſtito habetur qui a Domino parato inveſtituram haud petiit, nec
" ejus Mors vel mora Domino obeſt: hac ratione hæres Vaſalli hære-
" ditate haud agnita, ſi ad pubertatem pervenerit, ejus Maritagium Do-
" mino debetur; & ex ejus delicto, vel uſus fructus vel prædium ipſum
" ad Dominum pertinet, etſi nunquam ei Vaſallus fuerit: id quidem in-
" tereſt inter hæredem ejus qui Vaſallus & in feudo inveſtitus obiit, &
" hæredem Reſignatarii; quod in illum, feudum quod deceſſoris fuerat
" renovatur & tranſmittitur; in iſto vero feudum incipit; nec eſt Hæ-
" res Emptori, in feudo quod ejus nunquam fuerat: Verum illud facile
" diluitur, quemadmodum enim in Jure qui in utero eſt, ad varios effec-
" tus fictione Juris pro jam nato habetur; haud ſecus ubi feudum con-
" ſtituitur & eo naſcendo maturuit, ut ab alienante abdicatum & in
" manibus & penes ſuperiorem ſit; ſed ea lege & fiducia, ut acquirenti
" novum infeofamentum concedatur, pro enato habetur; nedum quoad
" ſuperiorum & compendia & emolumenta ad eos pertinentia; ſed ad
" quoſdam alios effectus; Hæres enim Reſignatarii qui morte præreptus
" deceſſit ſine faſina; etſi primo inveſtitus ſit ex alienatione, ſuccedit
" tamen in Jus acquirentis & non ſuo ſed Jure hæredis; & fictione bre-
" vis manus feudum nanciſcitur ut hæreditarium: Haud ſecus quam ſi
" Acquirenti inveſtito, ipſe (eo mortuo) ut hæres inveſtitus fuiſſet; ideo
" feudum in ejus Perſona haud novum & Conqueſtus, ſed hæreditas cen-
" ſetur: Et ſi deceſſerit orbus & ſine liberis ad Agnatos ex latere deſcen-
" dit. Adhæc, licet feuda plerumque Acquirenti ſint libera, ut de iis
" pro arbitrio ſuo diſponere poſſit hæredibus: quædam vero ſunt fidei
" commiſſaria & vinculata, ut nec alienari nec ære alieno gravari poſſunt;
" Feudum tamen haud ut liberum conſequitur, quæ parente præmor-
" tuo primus ex Alienatione inveſtitur; ſed ſi Conditionatum ſit,
" conditionibus parere debet; & niſi Paruerit feudo mulctandus ex
" lege commiſſoria ſeu Clauſula irritante; adeo in Jure ſpes prox-
" ima & radicata multum attenditur & operatur: & acquirenti nedum
" ſpes ſed ex Reſignatione Jus, adeo radicatum fuit, ut Reſignatario &
" ejus hæredibus, & Jus ab eo habentibus auferri vel avelli nequeat: &
" Domino neceſſe ſit feudum iis per inveſtituram tradere qui primi erant
" per Reſignationem: dumque Vaſallus ex Charta & præcepto ſaſinam
" & traditionem operitur, interim umbra quædam traditionis præcedit,
" fundo Domino ſurſum reddito per fuſtis & baculi traditionem, in
" favorem acquirentis, & ſtatim per idem ſymbolum rurſum reddito Re-
" ſignatario aut ejus procuratori.

Quæſtio Tertia.

An in feudis, quæ de Domino Rege tenentur, idem Jus ſit, adeo ut per Reſignationem, Vaſallus deveſtiatur?

" *N.* AN in omnibus Feudis, ſive ea de Rege, ſive de aliis ſuperiori-
" bus teneantur, idem jus ſit, operæ pretium eſt quærere? Et
" quidem ubi eadem ratio idem Jus eſt; & contrario ubi diſpar ratio di-

" versum Jus. Id autem ne[illegible]
" gem & alios ſuperiores [illegible]
" ſua Jura & commoda ſcire [illegible]
" negligant ſuo periculo & diſpendio eli[illegible]
" tus ut Regno bene ſit nec quid [illegible]
" mole obruitur ut rebus ſuis & [illegible]
" ſtor & Proquæſtor aliique quibus [illegible]
" data eſt, viri Illuſtres & impigri in [illegible]
" & implicíti; tot negotiis diſtinentur, ut [illegible]
" eſſe queant: Hinc *Obreptio & Subreptio* [illegible]
" pum ſæpe ſed fruſtra vetita; hinc etiam Negligentia, haud ex ſolo or-
" dia quæ in viros ampliſſimos & diligentes non cadit, ſed reipſa, ut
" quibuſdam caſibus dolus, etiam ſine dolo & reipſa eſſe dicitur: Ideo
" Conſtitutione Regis *Jacobi Sexti, Parliamen.* 16. Cap. 14. Neceſſe fuit
" cavere, ne Officiariorum & Miniſtrorum Regis negligentia Regibus
" noceat: conſultum igitur videtur eſſe, nec rimam relinquendam
" qua irrepant, nedum portam apperiendam qua erumpant fraudes; id
" autem futurum, ſi ſtatuatur ex Reſignatione in manibus Regis (aut eo-
" rum quibus id munus commiſit ut Reſignationes recipiant) Vaſallum
" penitus deveſtitum eſſe; nam Reſignatio iſta ſit, nulla indagine aut in-
" quiſitione prævia, quænam ſit Reſignantis aut Feudi conditio; an is
" æger vel moribundus, et forte nothus aut Baſtardus; an vero Feudum
" Jure aliquo affectum ſit, aut obventione ante Reſignationem debita &
" cedente, aut Regi caducum & commiſſum ex delicto; ſic haud diffi-
" cile erit Regem fraudare, imo ludificare; *e. g.* Reſignatione feudi mi-
" litaris facta a Vaſſallo, cui hæres ſit infans aut impubes, in favorem emp-
" toris ſimulati, ſi præmoriatur alienans, cauſabitur emptor eum deveſti-
" tum, nec hæredis impuberis vel cuſtodiam vel Maritagium obvenſſe:
" Sin Reſignatarius morte pereptus ſit, alienans dicit ſe haud deveſtitum,
" nec de alienatione aut Reſignatione conſtare: Notarius ſiquidem qui
" Reſignationibus faciendis adhibetur plerumq; obſcurus, & ejus opera
" utentibus addictior eſt. Contractus autem vel Diſpoſitio ex qua Reſig-
" natio fit, penes contrahentes remanet; & cum ſine ea Reſignatio ina-
" nis ſit, ea celata vel deleta, facile erit rem eo redigere, ac ſi nec alie-
" natio nec Reſignatio celebrata fuiſſet; & prout ex re eorum videbitur.
" & magis commodum. Colludentium arbitrium erit, utrum alienans,
" an vero acquirens eorumq; hæredes Regi vaſalli forent; ut eſt in Apo-
" logo de homine fallaci, & dolo ancipiti Numen ipſum fallere auſo, &
" periculum facere an omnia ſciret, & vera reſponderet: Cum enim ſub
" veſtis lacinia paſſarem haberet ſciſcitatus eſt, an avicula quam haberet
" viva an mortua eſſet, certus, ſi Oraculum vivam diceret, eam necare
" illiſo cerebro; ſin mortuam, promere vivam: Reſponſum penes eum
" eſſe utrum vivam an mortuam malit: ſed mille ſunt nocendi & frau-
" dandi artes, quas referre, nec tutum eſt ſæculo iſto in fraudes nimis-
" prono, cùm vel memorare docere ſit: verum re penitus inſpecta vi-
" detur *Reſpondendum*, idem Jus eſſe in omnibus feudis, nullo inter Re-
" gem & alios ſuperiores diſcrimine, niſi quoad accidentalia quædam &
" extrinſeca, de quibus non curat Lex; eadem autem eſt utrobique ra-
" tio; ea ſcilicet, poſtquam Vaſallus deveſtitus eſt Alienatione, & ex ea
" Reſignatione facta & admiſſa; ex ejus vel delicto vel obitu, nihil vel
" Commodi Domino directo, vel Incommodi acquirenti poſſe evenire;
" Rex enim licet ſupremus, & ut *Angli* loquuntur *Superior paramount*,
" in Feudis ſive dandis ſive renovandis Jure haud Prærogativo ſed com-
" muni utitur: Et cum ſit fons Jurisdictionis quod Juris in alio ſtatuit,
" eo uti haud gravatur: Nec obſtant quæ attigimus Incommoda; nec

Incom-

" Incommodum singulorum, nedum Jus solvit; est hominum sors, ut
" nihil humani incommodi expers & vacuum sit: Imo inter regulas Juris
" est, *Omnes Definitiones in Jure periculosæ*, adeo ut vix fieri possit
" quin aliquo incommodo subvertatur. Ex adverso, haud desunt incom-
" moda multa & gravia; in isto igitur conflictu, ut præsumtiones levio-
" res & debiles fortioribus cedunt, ita incommoda aliis & gravioribus
" diluuntur: Si igitur aliter statuatur, quæ populo & acquirentibus ti-
" menda sunt incommoda magis prægravant; Rex siquidem de lucro
" captando, hi vero agunt de damno vitando; Rex de obventione &
" lucello casuali, & directi Dominii fructibus jactura levi & facili refar-
" cienda; aliis subinde renascentibus.

Quæstio Quarta.

Si Alienatione facta, et ex ea Resignatione; alia postea fiat, et ex ea etiam Resignatio in favorem alterius, isque primus Investitus fuerit: et post eum prius acquirens: Quæritur uter Potior?

" Alienatione facta & ex ea Resignatione, si postea alius Emp-
" ptor vel aliter acquirens, ex posteriore Resignatione prior inve-
" stitus fuerit, & post eum prior acquirens fuerit etiam investitus ex
" priore Resignatione, haud immerito. *Quæritur*, Uter potior Jure,
" & præferendus sit?

" De ea ratione, apud authores nostros, nihil certi aut expediti Juris
" reperitur: Quibusdam quidem, qui prius investitus est, licet ex poste-
" riore Resignatione, potior videtur; ea ratione subnixis, quod ubi jus
" per varios gradus perficitur, aut ex pluribus partibus integratur, is præ-
" ferendus sit, qui per reliquos gradus in summum prior innititur, & ex
" omnibus partibus Jus integrum & completum nanciscitur; nec enim
" in Certamine Equestri qui statim à carceribus perincitatis, impetu alios
" prætervolat, Brabeum consequitur, sed qui totum emensus curriculum
" primus ad metam decurrit.

" Verius tamen est, & consequens iis quæ superius disseruimus,
" primum Resignatarium licet posterius sasitum, jure potiorem esse; &
" posterius acquirentis jus nullum & irritum esse; utpote a non habenti-
" tibus potestatem profectum. Summus quidem est Diligentiæ favor, &
" vigilantibus jura subveniunt: Ac quod de *Julii Cæsaris* foelici & om-
" nia vincente industria exemplari, prodirum est isto versu.

Nil actum credens, dum quid superesset agendum.

" Id in jure assequendo, & ubi de eo diligentiâ certatur, locum ha-
" bet: Sed in ista specie, tantum abest ut secundus Resignatarius, prior
" jus consummatum adeptus sit, ut nec ullum habeat vel habere potuerit,

" vel ab alienante vetita dispositio aliena, seu libera domino utili
" per alienationem & Resignationem in favorem primi acquirentis, penitus
" extincta, nullum habuit quod in secundum transferret; Jamne illud etiam
" pueris notum & inter ludentes tritum, *Qui nihil habet, nihil dabit*, &
" juris prudentiæ principium & regulam, *Nemo potest transferre in alium*
" *plus juris quam ipse habet*.

" Nec magis ex alterutra Resignatione, in favorem vel prioris vel
" secundi Resignatarii, penes dominum directum jus aliquod erat, quod
" in secundum transferret; cum enim prima Resignatio in rem & fa-
" vorem tantum primi acquirentis fuerat, & limitata causa produceat
" tantum limitatum effectum; ex ea Resignatione, nec secundo Resig-
" natario nec alii nisi priori prædium dari potuit: Ex secunda vero Re-
" signatione, cum sit prorsus cassa & inanis facta, scilicet ab alienante
" prius devestito, & qui nullum jus haberet quod resignaret; ex ea nul-
" lum jus erat penes Dominum directum quod transferret in secundum.

" Hinc est quod Resignatione facta, haud dubii Juris est vassallum
" subfeudum & prædium de se tenendum alii non posse disponere; Cum
" igitur Jus inferius & ut loquimur *Bassum* dare nequeat, an adhuc penes
" eum erit Jus & potestas per novam alienationem & Resignationem,
" prædium alteri concedendi, ut jus majus & nobilius & de domino Su-
" periore tenendum consequatur? Obstante juris regulâ, *Cui non licet*
" *quod minus est ei quod majus est non licere*.

" Cum prædia acquiruntur per Resignationem, eorum dominium non
" statim & instar Boleti emergit, sed per varios gradus constituitur &
" elaboratur: ii vero sunt, ut proprietarius & qui utile dominium habet
" alienet, ut deinde vel ipse vel (quod plerumque fit) ejus procurator,
" jus suum & dominium in manus domini directi resignet; adhibito no-
" tario & Instrumento Resignationis in favorem acquirentis confecto;
" utque Superior prædium non jam Vassalli, sed cujus jus penes ipsum
" est, disponat Cartâ suâ, addito mandato de Resignatario investiendo,
" vulgo *Præcepto Sasinæ*; & demum ex eo, acquirens investiatur: per
" priores istos gradus devestitur alienans, sed in gratiam & in rem ac-
" quirentis; per posteriores investitur acquirens; Quemadmodum autem,
" ubi Scala adeo angusta est, ut per gradus singulis tantum ascensus sit,
" prioribus gradibus per aliquem vel occupatis vel sublatis, in superiores
" inniti nullus nec separatur nec conatur; Haud secus in feuda acqui-
" rendo, ex ista graduum serie, prioribus, quibus alienans dominio &
" jure suo nudatus est, sed in primi acquirentis gratiam, per eum occu-
" patis; alteri posterius acquirenti, in ulteriores gradus penetrandi, nec
" spes nec Locus relinquitur: exinde de jure acquirendo & diligentia,
" frustra certamen esset, prædio per priorem Resignationem Resignata-
" rio adeo affecto & addicto, ut alterius esse nequeat.

" Ad hæc cum duplex sit Resignatio prædiorum, vel *ad Remanen-*
" *tiam*, vel *in Favorem*; utriusque quoad Resignantem idem & par est
" effectus, ut devestiatur scilicet; & quod ejus fuerat dominium utile,
" ejus esse desinat, & penes Superiorem & in ejus manibus collocetur:
" utroque casu dominium utile cum directo e vestigio coalescet & con-
" solidatur; sed eo discrimine, quod ubi Resignatio fit *ad Remanentiam*
" & in rem ipsius Domini, Consolidatio id operatur, ut tam utile quam
" directum dominium penes Dominum sit, sed ut suum nec divellendum;
" ubi vero Resignatio fit *in favorem*, dominium utile ita transit, ut in-
" terea cum directo conjunctum, penes dominum Superiorem sit; sed
" ea lege & modo ut Resignatarium investiat: nisi enim Dominus esset,
" & etiam utile haberet dominium, nec id Carta sua dare posset: quod
" & ex ipsa Cartarum ex Resignatione stylo manifestum est; nam iis Do-

" minus

" minus directus terras disponit, non ut amplius alienandi, sed quarum
" jus ad alienantem pertinuerat, & per Resignationem translatum & col-
" locatum est in manus suas, sed ligatas ea lege pro novo scilicet Infeo-
" famento acquirenti dando. Ex his sequitur, vasallum per Resigna-
" tionem sive ea sit ad Remanentiam sive in favorem, pariter divestitum;
" & post alterutram, in ejus fraudem, nec honeste nec utiliter alienare
" posse.

" ACCEDIT, quod haud pridem in mores nostros irrepsit, & iste ap-
" ud alias gentes frequentior, ut Investitura in usum & rem alterius quam
" Investiti: Si igitur alienatio fiat Domino directo, sed in rem & usum
" alterius, & ex ea Resignatio facta sit ad Remanentiam, isto casu haud
" ambigendum, alienantem frustra alienare in fraudem usuarii, in cujus rem
" & usum prædium Domino directo alienatum & sursum redditum fue-
" rat. Nec magis dubitandum est, & ea Resignatione quæ fit *in fa-*
" *vorem*, alienanti ademptam omnem alienandi potestatem: nam utraq;
" Resignatio fit in manus superioris, sed in rem alterius; & ista quæ fit
" in favorem pariter transfert prædium in Domini manus, quodammodo
" ad Remanentiam, & apud eum remansurum, donec ex lege fiduciæ,
" quæ in Resignationibus contrahitur, Resignatarius investiatur.

" DEMUM, Resignatio adeo solennis & in rem, & dominii ab alienan-
" ante translativa est, atq; in ea tot actus interveniunt, tam alienantis qui
" resignat, quam Domini directi qui Resignationem admittit, & jus pe-
" nes se translatum Resignatario reddit, tradito symbolo in Fidem & Ar-
" rham Investituræ subsequuturæ; intervenientibus etiam Notario & te-
" stibus; ut Resignante mortuo, defunctis etiam tum domino directo,
" tum Resignatario: Resignatio tamen ejusq; vis & effectus haud inter-
" cidat & evanescat; nam & iis casibus, Investitura a domini directi suc-
" cessoribus, Resignatario aut ejus hæredibus, vel ab eo causam habenti-
" bus, dari debet. Ea argumenta sunt, per Resignationem dominium
" utile ab alienante discedere, ita ut in superiorem transferatur, & cum
" dominio directo, cui interea unitum est, transeat; nedum ad domini
" hæredes, sed ad successores quoslibet singulares. Ex istis omnibus, quæ
" ut de re & quæstione tanti momenti prolixius discerptata sunt, manife-
" stum est alienanti per Resignationem dissasito, nullam vel juris umbram
" vel vestigium supersesse; & alienationem, & ex ea Resignationem, si
" quam posterius fecerit, & Investituram etiam priorem ea, quæ ex pri-
" ore Resignatione secuta est, inutilem & nullam esse; ut a non haben-
" tibus potestatem; saltem annullandam actione rescissoria, quæ nobis,
" *Reductio* dicitur.

Quæstio Quinta.

An is qui in Dominium directum successit Titulo singulari, teneatur Acquirentem in vasallum recipere ex Resignatione in manibus authoris.

" EX eo quod superius dictum est, Dominium scilicet utile, ex Re-
" signatione in manus superioris sursum redditum, cum dominio
" directo, ad successorem in eo etiam singularem transire; ea suboritur
" *Quæstio*, An successor singularis teneatur acquirenti, vel ejus hæredi-
" bus

" bus, dominium ut [illegible]
" juris, retinendum iis competat [illegible]
" qui ex Refignatione terras, quod dominium utile [illegible]
" pit, intercellit necessitudo cum successore, qui [illegible] be-
" res, aut alio titulo universali; aut ex fiducia, quæ in [illegible] in-
" tervenit, fidem ejus liberare tenentur. Nec magis negotium sui facit cum
" Refignatario; vel ullus, quo obligetur, vel contractus, vel quasi con-
" tractus.

" Sed præter personales, sunt aliæ etiam obligationes in rem, quibus
" res ipsa subjacet, & qui eam nanciscitur sese subjecit: Sic qui adjici-
" tur prædium servituti obnoxium, licet ejus dum acquireret nulla men-
" tio aut exceptio fuerit; patientiam tamen, & quæ ex servitute debun-
" tur, præstare tenetur. Idem de Annuis Redditibus, & pactis de re-
" trovendendo, & Retractibus seu Reverhionibus, & Lege Commissoria
" dicendum: Res enim semper transit cum sua causa & onere; nec alio
" aut pinguiore jure Successor utitur, quam eo quod decessor aut author
" habuerat. Ea autem est causa dominii directi, ut quandocunque do-
" minium utile per Refignationem cum eo conjunctum est, qui eam re-
" ceperit, vel ejus successor etiam singularis, gravatus sit Refignatario &
" ejus Successoribus dominium utile restituere.

" Si id facere cunctetur vel renuat dominus directus, in promptu re-
" medium est; ut *scilicet* coram Senatu seu Collegio Judicum in Causis
" Civilibus Supremo, actio summaria intentetur, & exhibito instrumento
" Refignationis, & novissima Carta & Investitura Auctoribus concessa,
" petatur juxta eam novam fieri Refignatario vel ejus hæredi, Sententia
" lata; Si Dominus directus haud pareat, sed adeo contumax sit, ut Re-
" bellis & Exlex denuncietur Banno publico, & Cornu pro Tuba insuto
" ut moris est, quod ideo *Cornuatio* apud nos dicitur; Demum jussu &
" mandato Senatus, Cancellarii Director præceptum Sasinæ dirigat pro
" Refignatario, vel ejus hærede investiendo, ita ut de Domino directo
" teneant, nec vassallus Jure suo fraudetur, nec Dominus suo etiam culpa
" sua decidet; Mulctandus tamen ob pervicaciam & Rebellionem, bonis
" omnibus mobilibus tam rebus quam nominibus Regi caducis; quod
" *Escheatam* vocamus.

" Ista sunt intelligenda de prædiis quæ de Subditis tenentur; Rex
" enim & Quæstores Regii, quique alii ei a Rationibus sunt, id quod
" justum est haud gravate facere præsumuntur.

Quæstio Sexta.

An Superior nedum Refignatarium ejusque Hæredes, Cessionarios investire teneatur?

" Quæstionem præcedentem de Refignatario ejusve hæredi-
" bus recipiendis, excipit ista *de Assignatis*, hic Cessionarii (sed tarum
" Latine) apud nos dicuntur; omnia autem Jura, moribus nostris, cedi
" possunt, de quibus Investitura haud sequutura vel nec dum secuta est;
" Si igitur alienatis prædiis, & ex alienatione Refignatione secuta, ac-
" quirens ea & jus suum per Alienationem & Refignationem sibi quæsi-
" tum per Cessionem in alium transtulerit: *Quæritur*, An Dominus di-
" rectus Cessionarium recipere teneatur? Et quidem extra quæstionis
" aleam

" ram pr
" &c. Lic
" star pa
" fere ob
" extrahe
" Ennius
" conduc
" multis
" est Fe
" laudand
" recto p
" Cæterum
" semeri
" & Cust
" huc par
" rerum,
" in Feudis
" dispari; ita
" & utrique
" Naturali, Divino
" commutione, plerumque
" da, Maritagio, Donatione &
" mino directo: ut
" fructibus maturè
" lus Domino directo, cavendum
" morosum & difficilem, &
" non adversarium habeat.
" consultum est, ne invitus
" Nec obstant quæ superius dicta sunt, Dominum *sciz.* Resignatione
" in ejus manus facta, in favorem & in Gratiam acquirentis & ejus hære-
" dum & assignatorum; ea ipso contractu, ut acquirentis tam hæredes
" quam assignatos in Vasallum recipiat; Verba enim ista jam in Aliena-
" tionis quam in Resignationis Instrumentis intelligenda sunt civiliter &
" secundum subjectam materiam, scil. ut Resignatione facta Resignatari-
" um & Hæredes ejus investiat (Hæres enim in Jure censetur eadem Per-
" sona cum defuncto) Cessionarium vero si sibi vitam fecit: Imo si
" Resignatarius investitus sit Charta ipsi & Hæredibus & Assignatis con-
" cessa, Feudo mutatur, si talliare sit, & Vasallus in Feudo vel de se
" vel Domino tenendo, hæc Domini consilia evitet.
" Cum duæ sint Alienationes, altera Resignatarii, altera Cessionarii,
" una autem investitura, si Dominus ab altero ex Cessione investiare
" paratus sit, [illegible] in unius aut duplex Laudimium.
" Domino solvendum [illegible] penes eum arbitrium
" sit vel haud admittere, [illegible] conditionibus & Laudi-
" miis eum recipere; de [illegible] per compromissum. Cessionarius bre-
" vi manu recipere velit, Charta & ex ea Sasina ei tradita; haud invi-

“ [illegible]
“ operolo [illegible]
“ tradit[illegible] &
“ iterum Char[illegible]

De Resignat[illegible]

Ap[illegible]

“ SUPPOSITO [illegible]
“ dicisse; & Refignat[illegible]
“ alias clauſulas ſolen[illegible]
“ & per Dominum d[illegible]
“ teſtibus, ut mors [illegible]
“ obiiſſe, relicto Hæ[illegible]
“ *ritur*, An Cuſtodia & M[illegible]
“ recto obveniant & debean[illegible]
“ tronis haud deeſſe argu[illegible]
“ tro citroque perpen[illegible]
“ detur eſſe conſentane[illegible]
“ bona fide acta ſint, & dolus [illegible]
“ venditore forte in extremis & morbo ſuprem[illegible]
“ properata, ut fraus & fucus fiat Dom[illegible]
“ dato iſtis & aliis Dominii ſui fruct[illegible]
“ pediem obventuris; Si forte venditor [illegible]
“ tibus, & Domino (ut fere Magnates [illegible]
“ differtur & ſuſtinetur Inveſtitura, [illegible]
“ ſtretur Dominus: Cauſantur[illegible]
“ deveſtitum; ſi Emptor, cum nondum [illegible]

“ Ubi igitur prædium venditum, & Reſignatio in Dominum volentis & “ acceptantis manum facta eſt, nec ulla fraus, aut [illegible] ſuſpicio ſubeſt, “ venditor Dominio utili exutus & penitus deveſtitus eſt, adeo ut ad eum “ deveſtiendum, omnia ab eo acta ſint; ita ut nihil ſuperſit agendum: “ Nec ullum penes eum ſit Jus vel Juris umbra; niſi pacto inter eum & “ Dominum convenerit, ut a Reſignatione recedatur; quod plerumque “ fit, cum ſupervenit alius Emptor, & Reſignatione facta in ejus gratiam, “ novo Emptori gratificatur Dominus, Charta & Inveſtitura ei conceſſa; “ quod plerumque ſed parum honeſte fit, non obſtante priore venditio- “ ne & Reſignatione: quo caſu poſterior Emptor ſed primo Inveſtitus, “ & Jus plenum & perfectum conſecutus præfertur priori Emptori etiam “ inveſtito ſed poſterius: *Prior* enim tempore, quoad Jus completum, “ *potior* eſt Jure.

“ CUM igitur venditor quoad Dominum & Emptorem ſit deveſtitus, “ & quoad ſeipſum *Activè*; nec enim, ita deveſtitus prædio divendito, “ ex eo aliquid commodi aut emolumenti poteſt conſequi, aut ulterius “ aliquid agere ut deveſtiatur; Sequitur eum deſinere eſſe Vaſallum, & “ deveſtitum eſſe *Paſſivè* ut ita loquar: Nec ex prædio, quod amplius “ haud eſt ſuum, aliquid incommodi aut periculi, ipſi aut hæredibus me- “ tuendum; Juxta regulam, *Penes quem Commoda, penes eundem Incom- “ moda.* Et e contra.

“ 2. *Argum.* SECUNDÒ, Si venditoris filius [illegible] & co- “ ram inquiſitoribus patrem obiiſſe ultimo veſtitum [illegible] ſe ei “ Hæredem eſſe in eo prædio aſſerat, & ſeiſinam ſeu veredictum quande-

cum-

" ...abdi-
" ...ptorem
" ...
" ...
" ...ignatione haud
" ...tam incommo-
" ...fepræſen-
" ...debue-
" ...transferret; Vaſal-
" ...Feloniæ decreto feudalibus & Crimi-
" ...in Dominum
" ...ſcet, aut feudi uſuf-
" ...per Annum & Di-
" ...morte præ-
" ...præcepto, aut
" ...ſto, nec ulla vel
" ...intervenerit; Cre-
" ...aut Adjudicatio-
" nem ſibi addictum & in ſolutionem datum conſequitur; Emptore &
" Creditoribus ejus (ſi quos habet) fruſtra quærentibus ſibi legum prætex-
" tu deluſis, tum pretio quam prædio cedendum; eo colore quod præ-
" dium tum venditum, tum a venditore reſignatum, adhuc tamen penes
" eum & ejus oſſibus hæſerit, ejuſque Creditoribus & eorum diligentiæ
" obnoxium.

" 4. *Argum.* Si, mortuo venditore, Emptor a Domino directo petat
" Inveſtituram feudi, per Reſignationem in Domini manibus exiſtentis,
" ſed in favorem & rem Emptoris, & quaſi Domini fidei commiſſi, ut
" eum inveſtiat; & de Reſignatione conſtet, cum Dominus Inſtrumento
" ſubſcripſerit, aut juramento delato confeſſus vel habitus ſit pro confeſſo
" Reſignationem factam & admiſſam, Dominum ut Vaſallum inveſtiat
" cogi poſſe, explorati Juris eſt. Emptore autem inveſtito, qua fronte
" vendicabit Dominus Cuſtodiam prædii & filii venditoris, ejuſque Ma-
" ritagium, Non-introitum, aut alias obventiones ex obitu venditoris,
" cum Vaſallum habeat Emptorem, & ei inveſtituram dederit prædii ut
" optimi maximi, & quale ad venditorem pertinebat tempore Reſigna-
" tionis. Adhæc, Jura iſta Wardæ, Reliefi, Maritagii, & alia ejuſmodi,
" ideo introducta ſunt, ut Vaſalli hæredes minore & per ætatem officio
" & ſervitiis militaribus impari; Dominus feudum ob ſervitia conceſſum,
" ea cauſa ceſſante, ad tempus quaſi condiceret & rehaberet, donec hæ-
" res ad Legitimam ætatem perveneriit; & cum uxores apud viros fæ-
" pe uxorios plurimum poſſent, Domini multum intereſt, ex qua familia
" uxorem ducat, ne forte Domino iniquior aut inimica ſit. Eæ autem ra-
" tiones ceſſant Emptore inveſtito, viro ad ſervitia militaria parato &
" idoneo: nec refert quam uxorem ducat filius venditoris, qui nec eſt,
" nec futurus eſt Domini Vaſallus.

" Omissis aliis quæ pro iſta ſententia cumulari poſſent argumentis:
" quæ pro adverſa ſunt (quam poſſum paucis) perſtringam & diluam.
" Primum & in Jure fere unicum eſt; ſi venditor adhuc Vaſallus nec
" deveſtitus eſt, ex ejus morte Cuſtodiam, ſi infra ætatem Legitimam
" eſt, & ejus Maritagium ad Dominum pertinere, conſequens eſt: ante-
" cedens autem verum eſſe, & venditorem haud eſſe diſſaſitum ita ar-
" guitur; penes deveſtitum nullum reſidit Jus vel Juris veſtigium, quod
" alienare, aut in alium transferre queat; nemo ſiquidem plus Juris in
" alium transferre poteſt, quam ipſe habet; venditore vero, venditio-
" ne celebrata & Reſignatione ſecuta, non ſolum de facto alienare, ſed

“ [illegible]
“ [illegible]
“ Religi[illegible]
“ erit [illegible]
“ dicen[illegible]
“ [illegible]
“ [illegible]
“ [

" fore; feudi Cuſtodiam, Maritagium, & alios Dominii illius fructus &
" emoſumenta, ſi ex perſona venditoris haud obveniant, quia vaſſallus
" eſſe deſiit; ex perſona Emptoris haud ſperanda; nec enim unquam
" fuit, nec certum eſt an futurus ſit Vaſſallus; ſiquidem *multa cadunt in-*
" *ter alicem ſupremaque labra*: Porro, cum nec Alienationis inſtru-
" mentum nec Reſignationis penes Dominum ſit, ſed illud penes Empto-
" rem, iſtud penes Tabelliones, homines iſto ſeculo lubricæ & ſuſpectæ
" fidei; in ſuſpenſo & incertum fore, utrum Dominus ſit venditori an
" Emptori; & colludentibus facile eſſe utrum velint, & prout e re ſua
" & ſibi commodum fuerit, Domino Vaſſallum obtrudere, celatis Inſtru-
" mentis aut deletis.

" Ad iſtud Argumentum. haud reſpondebo, quod vulgo dicitur, In-
" commodum non ſolvere Argumentum nedum Jus: ſed oſtendam, caſu
" ſuppoſito, quæ ſupra memorata ſunt, non ſequi incommoda: necenim
" verum eſt Dominium directum interea inutile & infœcundum fore;
" nam Alienatione & Reſignatione facta, quæ non tam jus eſt quam via
" ad Jus, licet Emptor *Jus in Re* & *Completum* ante inveſtituram haud
" nanciſcatur; ex Alienatione tamen Jus habet *ad Rem*; & ex Reſig-
" natione recepta a Domino directo *Jus in Re inchoatum*; ſed adeo ef-
" ficax, tam quod Dominum quam Reſignatarium, ut ſi venditor dolo
" malo alii vendiderit, & Dominus directus dolo affinis fuerit, ſecundum
" Emptorem inveſtiendo, neutri impune ſit; ſed Actio detur primo Em-
" ptori contra venditorem *ex Empto:* Et ſi inops ſit, & contra eum
" actio inanis futura; datur adverſus Dominum *ex Stellionatu & dolo,*
" pro damno & intereſſe: Imo cum Reſignatarius recipendæ inveſtituræ
" in ſpe proxima ſit, & ſpes radicata in Jure multum operetur, ſi nulla
" Domini mora aut cunctatio ſit, habetur pro inveſtito, quoad Domini
" commoda & obventiones: quando enim ſtat per eum, cujus intereſt,
" aliquid fieri ne id fiat, habetur pro facto & impleto: Si igitur Reſig-
" natarius moras nectet Inveſtituram petat, Terræ erunt in Non-introitu,
" Et eo durante Dominus fructus conſequetur; Et ſi moriatur, Cuſtodia
" & Maritagium hæredis, & ex hæredis rebellione, uſusfructus, ſi per annum.
" in ea perſtiterit, & aliæ id genus obventiones, ad Dominum directum perti-
" nebunt: haud ſecus quam ſi defunctus fuiſſet inveſtitus. Et quemadmodum
" mortuo Vaſallo, ejus hæres etiamſi hæreditatem non adierit, imo re-
" pudiarit, pro inveſtito habetur, eatenus ut Dominii fructus & emolu-
" menta obveniant, *v. g.* Non-introitus, Maritagium, & ex delictis Eſ-
" chetæ, ſeu caduca, & privatio vel feudi vel uſusfructus; nec enim ejus
" mora aut culpa non petendo Inveſtituram Domino obeſſe debet: Non
" abſimili ratione, Reſignatarius, ubi de Domini commodo agitur, pro
" Vaſſallo cenſetur; ſi per eum ſtet quo minus ſit Vaſſallus. Quod de
" Incertitudine objicitur, facile diluitur; ſi enim Terræ non tenentur de
" Domino Rege ſed de alio Domino, ſibi Dominus cavere debet & ſuo
" periculo ſi ſecus faxit, ſibique imputatur; nec fere evenit aut contin-
" gere poteſt, ut Dominus aliquid detrimenti capiat; Vaſſallus enim Do-
" mino invito haud obtruditur; & ante Reſignationem cum Domino
" tranſigitur de Laudimiis, & ſi quæ alia ab Emptore præſtanda ſunt
" Domino, ut ab omni periculo & incommodo ſecurus ſit. Non diffiteor
" longe aliam rationem eſſe Domini Regis; Cum enim Pater Patriæ ſit,
" nec ſit e dignitate ſua cauſari aliquem ſubditis ſibi iniquum aut infen-
" ſum; nullo delectu aut diſcrimine Reſignationes recipit, per eos qui-
" bus eam Provinciam demandavit. Adhæc, Principes de rebus publicis
" ſolliciti, privatis ſupereſſe nequeunt; & viris clariſſimis, qui a Ratio-
" nibus ſunt (utcunque impigris & ſedulis) haud mirum eſt ſi aliquando
" imponatur; ſed fraus deprehenſa punitur: & lege conſultiſſima ſtatu-

" ſum, Regis Miniſterium
" nec difficile adhibere
" catur, & inter alia
" Inſtrumentum Reſignationis ſtatim conficeretur
" tam Reſignante quam Reſignatario, & apud
" ponatur; alioqui Reſignatio habeatur pro
" Reſignationem celebratam, & incommoda
" terea, quæ pro Negativa diſſeruimus, intelligi velim, ſi compertum ſit
" Reſignationem factam, nec fraudem ſubeſſe, eo caſu; quia omne Jus
" Rege ut Juris fonte profluit; & ſi ſcriptum ſit, ſanxit; ſi moribus in-
" troductum permiſit, & quaſi tacito conſenſu firmavit; quod in alios
" ſtatuerit Jure uti debet.

" Cum Deus nobis hæc otia fecerit, aut fieri permiſerit, ſtatueram ea
" utcunq; oblectari id genus exercitationibus; & comperto quæſtionem in
" foro ventilari, videbar mihi operæ pretium facturus, ſi, in caſu arduo,
" exitus dubii & ancipitis, & quicunque demum futurus ſit magni mo-
" menti, quid Juris ſit diſpicerem; & quid meæ eſſet opinionis dicerem:
" Id feci eo animi candore, ut nec in Regem ſtudio, quod mihi ſemper
" maximum fuerat, nec alio affectu tranſverſum rapi, mihi permiſerim;
" licet in cauſa ſimili etiam res mea ageretur; nec ſocero, nec vitrico,
" nec aliis ultimus hæres fui; nec aſſentatione, aut aliis artibus ab aliquo
" opes eblanditus aut adeptus ſum nec munus: Antequam enim ad mu-
" nera, eodem quo nunc mihi ereptum eſt impetu, & ab iiſdem raptus
" ſum tantum non invitus, & eorum quæ mihi acciderunt præſagus, Deo
" largiente, & induſtriæ laborioſæ & innoxiæ, & alienis haud inhianti,
" favente, fui, & adhuc ſum Superior & Dominus directus haud unius
" Vaſalli. Sed cum iſta animo agitarem, immo perſcripſiſſem, haud a-
" nimo præjudicandi, nedum ſugillandi ampliſſimi Senatus ſententiam,
" incertus quænam futura eſſet. Sed ne animus negotiis aſſuetus, immo
" ab ineunte ætate innutritus, nunc ignobili otio & deſidiâ torpeſceret:
" Tandem mihi nunciatum eſt, Senatum pro *Affirmativa* judicaſſe, ſe-
" cundum actorem Regis Donatarium.

S. In this *Latin* Treatiſe of Six Queſtions with an Appendix, The Author ſeems to have more intended a Specimen of his *Latin* than of his good Law: For all along he ſeems to hold, That a Vaſſal reſigning *in favorem*, and the Superior accepting, the Vaſſal is *eo ipſo* totally denuded: And that if he ſhould grant a Second Reſignation *in favorem*, and this Second ſhould be firſt infeft; yet it ſhould avail nothing. *Sed verius videtur contrarium: Cum ſi forte idem reſignans in favorem alterius reſignaverit; & hic prius inveſtitus fuerit, præferetur primo Reſignatario: Quod certiſſimum argumentum eſt, Jus* Radicale *penes Reſignantem eſſe, donec ejus Reſignatarius, ſive primus, ſive ſecundus, ſive tertius inveſtitus fuerit.*

But this is not the *only* Miſtake, tho' the *Fundamental* One, which the Author falls into in this Diſcourſe; where, among other Things, he cenſures Sir *Thomas Hope*'s Opinion, That where a Reſignation is made and accepted, the Reſigner cannot grant a baſe Infeftment, tho' cled with Poſſeſſion in Prejudice thereof. And yet if after this Reſignation made and accepted, he ſhould make a Second Reſignation, and the ſame ſhould be accepted in favours of another Party; This Second Reſignatar, if Firſt infeft, would be preferred. Which Opinion, our Author alledges to be too ſubtile, and charges with this Abſurdity, Of allowing the Reſigner a Power to give a *Jus nobilius, & feudum de Domino tenendum*; when he hath not the Power to give *Jus inferius, & feudum de ſe tenendum:*

[illegible]. And [illegible] *Oedipo æquat.* Whereas *Hope* gives his Reason very plainly in One Word; That where the Resigner resigns, and the same is accepted by the Superior, there is *duplex actus*; *viz.* That of the Superior, as well as the Deed of the Resigner; which may justly be thought to incapacitate the Resigner from giving a base Infeftment. But in the other Case, tho' there be the same *duplex actus*; Yet the Second Resignatar having *Jus* in his Favours, and First completing his Right by Infeftment, should be preferred. And this is so reasonable, that I should encline to be of *Hope*'s Opinion, were it not, that, according to the Analogy of our Law, a base Infeftment cled with Possession, seems to plead the Preference, notwithstanding of a prior Resignation made and accepted, where no Infeftment followed; For the Sasine being the Tradition, perfects the Transmission; and the Possession upon it, makes it sufficiently publick.

Retention.

N. Quæritur, IN the Cases of Compensation (mentioned *in the Questions Second and Third anent Compensation in the Letter* C.) If at least the Defender may pretend, that he should not be in worse Case, than if the Assignation were not made; and therefore ought to have Retention until his Debt be liquidate? *It is Answered,* That there is no Ground for Retention, but the Defender ought to have done Diligence to affect the Debt due to him; which he might have done by Inhibition upon the Dependence, or by assigning his Action, to the effect Arrestment might have been made in his Hands of the Debt due by him.

S. THIS depends upon the 2d and 3d Questions of the Title *Compensation.* And plainly, Retention ought to be refused, as the Compensation there is rejected.

Retours.

N. IF the Sheriff-Clerk, and Sheriff of the Shire, to which the Lands are unite, may not give Sasine, and will be liable to answer *in capiendo Securitatem,* for what is contained in the Retour, as to both Lands?

S. WHEN Lands in one Shire are united to Lands in another, the Sheriff or the Sheriff-Clerk of the Shire giving Sasine at the Place of Union, will be liable upon the Clause *capiendo securitatem* for all contained in the Retour.

Retoured Duty.

N. AN Annualrent of *One hundred Pound Sterling,* being given out of a Barony, for a Sum of Money lent to a Baron upon that Surety, to be holden of the Superior: *Quæritur,* If the Barony, being of a

considerable Right, ſuppoſe
new Eſtate of the
alrent ſhould be in Non-entry,
Annualrent, upon that Pretence
only a Proportion of the retoured
It is thought, That it ſhould be only a Proportion of the retoured Duty;
and *valet ſcilicet* is only underſtood, where there is no other retoured
Duty: And in this Caſe, it appears there is no other retoured Duty,
in ſo far as the whole Barony and Rent being retoured, the Annualrent
being the *fifth Part* is conſequently retoured: And it were abſurd,
that for the Non-entry of an Annualrent, there ſhould be more due than
for the whole Barony, ſpecially ſeeing the Superior wants not a Vaſſal
of the Barrony to ſerve him for the whole Barony; and the Annualrenter
is not properly a Vaſſal obliged to ſerve, being infeft only for ſurety of
his Money.

S. We had this Caſe before, Tit. *Infeftment in Property and Annualrent:* And the Queſtion is now beſt Anſwered by the *Act* 42, *Parliament* 1690.

Return of Lands to the Superior, upon a Proviſion.

N. IF there ſhould be any Difference betwixt *Ultimus Hæres*, and the King ſucceeding upon a Proviſion of Return Failzieing Heirs male? *Ratio Dubitandi*, An *ultimus Hæres* and the Donatar is liable to Debts; but in other Caſes, it is doubtful; becauſe it is a Maxim, that whenever Lands are returned to the Superior, either *ad Remanentiam*, or *ad Tempus*, as in the Caſe of Forefaulture, or Recognition, or Ward, or Non-entry, they return *pura & ut profecta ſunt*; and ſpecially in Ward-lands, and where it appears that the Superior *elegit familiam*, and has given Lands with an expreſs Proviſion of Return; it may ſeem reaſonable, that ſeeing he has none to ſerve him in the Family, he may have the Lands back in the Same Condition he did give them.

S. When Lands fall by an *Ultimus Hæres*, the King or his Donatar are liable to the Debts: But if the Lands ſhould be diſponed and given out to a Perſon and the Heirs of his Body, and no more, or any other the like clear Limitation; It appears but reaſonable that theſe failzieing the Lands ſhould return to the Granter free of Perſonal Debts. But ſince the Receiver of ſuch a limited Right was Fiar, and might have diſponed thereon freely: It ſeems that his real Burthens impoſed, as of *Wadſets* or *Annualrents* ſhould ſtill ſtand good: But for the Author's Returns upon Forfeiture, or Recognition, or Ward, or Non-entry, they are all feudal Stretches. And even a Return upon the bare Limitation above, may be doubted.

Return of Lands to the King, failzieing of Heirs Male.

N. THE King having diſponed Lands without an onerous Cauſe to a Relation or Servant and his Heirs male; which Failzieng to return, if the Maſculine Line fail: *Quæritur*, Will the King have Right without

without [illegible] the Lands be compriſed, (altho' the King [illegible]) Will the Comprising, tho' expired, be void, *Quia [illegible] reſolutiva Jus accipientis*?

S. The Return here [illegible], it ſhould therefore be without the Burden of perſonal Debts; but ſince the Receiver is Fiar, and that the Lands may be compriſed, it is ſtrange that Comprising ſhould both hold and expire, if not prevented, for the Return ſeems only to be provided in Caſe the Lands be not diſponed or evicted.

Reverſion.

N. A Reverſion being granted failzeing Heirs of the Granter's Body; may the Granter diſpone as abſolute Fiar? Will his Wife have a Liferent by the Contract of Marriage? Will ſhe have a Terce? So that the Effect of Reverſion will be only againſt his other Heirs than thoſe of his Body, if the Lands be not diſponed or burden'd by the Fiar.

S. This Queſtion ſeems to depend upon the Conception of the Reverſion; for, if it be a *pure* Reverſion without a Price, it ſeems to be of the Nature of a *Return*, if not of a *Subſtitution*: But if it be a Reverſion for any Payment, and be only conceived againſt the Granter's other Heirs not of his Body, ſtill it ſeems not to prejudge his Right of Fee; and that conſequently he may give a Liferent to a Wife, and that ſhe will have her Terce.

N. What is the Import of that Clauſe in Wadſets ſubjoined to Reverſions, That it ſhould not be lawful to redeem but by Payment, not only of the Sum given upon the Wadſet, but of all other Sums due by the Granter his Heirs and Succeſſors to the Receiverer and his foreſaids, if it be effectual, not only againſt the Heirs; and thoſe who repreſent the Granter, but againſt ſingular Succeſſors. *Rationes Dubitandi.* 1*mo*. The ſaid Clauſe is neither a Reverſion nor Eik to a Reverſion which ought to be ſpecial and contain certain Sums, or liquid Obligements. 2*do*. Deſtructive of Commerce, ſeeing it cannot be conſtant, whether the Perſon having Right to the Reverſion, be ſuch as may be dealt with; ſeeing it doth not appear by the Regiſter, whether he be owing to the Creditor any other Sums by that upon the Wadſets. 3*tio*. If the Reverſion ſhould go *per mille manus*, Will Sums due by all theſe who had Right thereto to the Haver of the Wadſet or his foreſaids, be real; ſo as to affect the Reverſion. 4*to*. May the Creditor take voluntar Aſſignations to Debts due by his Debitor, and ſo prefer ſuch of the Creditors as he pleaſeth, and burden the Reverſion, ſo that the Debitor cannot redeem. 5*to*. If other Creditors compriſe from the Debitor, before the Haver of the Wadſet be Creditor in other Sums to the Granter, will he be prejudged by the Compriſing, as *medium impedimentum*?

S. The Author reaſons well, That a Clauſe ſubjoined to a Reverſion, declaring that it ſhould not be lawful to redeem, ſave by Payment not only of the Sum of the Wadſet, but of all other Sums due by the Granter of the Wadſet, his Heirs and Succeſſors, to the Receiver and his Foreſaids; that this Clauſe ſhould not be effectual againſt ſingular Suc-

ceſſors: For the Clauſe ſeems [illegible] Relief, not only of [illegible] tracted for thereafter, which [illegible] to be of no Force as to Debts to be contracted after the Saline. And in effect the ſaid Clauſe in [illegible] what other Sums may be due by the Granter than [illegible] as to which it ſhould be real as [illegible] Reverſion?

N. What is the Import of [illegible] to Reverſion? Tho the Creditor will have a real Intereſt to affect the Duties, as if it were an Eik to the Back-tack? *Ratio Dubitandi*, The ſaid Sum is due upon the Wadſet, and *eo ipſo* that it is eiked to the Reverſion, it is eiked to the Tack; and *plus valet quod agitur*, &c. and on the other Part, Reverſions are *ſtricti Juris*, and Import no more than *quod ſonant*, *viz.* That it ſhould not be lawful to redeem, but upon Payment of the Sum contained in the Eik.

S. An Eik to a Reverſion, being a Deed of the Reverſer; it's thought will likewiſe be conſtrued to Eik to the Back-tack, as if the Sum in the Wadſet and the Eik were one: But as to a ſingular Succeſſor to the Granter of the Wadſet: If this Eik be duely made before the ſingular Succeſſor acquires Right, it militates againſt him in the ſame manner with the Reverſion: But if the Eik be made thereafter, it is but like a ſecond Wadſet, and cannot be drawn back. And tho' this Eik appear to be the Deed of the Reverſer, yet in effect it is the Deed both of the Reverſer and Wadſetter, as the Reverſion is ſelf.

N. Premonition being uſed (upon a Reverſion) to the Wadſetter for receiving his Money: *Quæritur*, If there be *locus Pœnitentiæ*, ſo that it may be paſt from? *Ratio Dubitandi*, *licet renunciare Juri pro ſe introducto*. On the other Part it may be pretended, That *Jus* is *quæſitum* to the Wadſetter; ſo that if it be his Intereſt to have his Money, he may upon the Premonition call for it. The Queſtion will be greater, if there be an Infeftment of Annualrent with a Reverſion to the Granter, without an Obligement to pay the principal Sum upon Requiſition; ſeeing the Perſon who has Right to the Annualrent, may be concerned to have the principal Sum; which he cannot have if the Heritor do paſs from his Premonition.

S. Tho' Premonition be made to a Wadſetter, to receive his Money in the Terms of the Reverſion, yet the Premoniſher may no Doubt reſile; the Premonition being provided in his Favours. And juſt ſo in Caſe of a redeemable Annualrent, tho' the Annualrenter want a Clauſe of Requiſition; for that's his own Fault.

N. If Compriſing of Lands diſponed to the Wife, will Import *Jure revocandi* competent to the Husband, ſo that the Deed in Favours of the Wife cannot be ſaid *morte confirmari*, in reſpect of the ſaid *medium impedimentum*? *Item*, Whether at leaſt the Wife will have Right to the Legal?

S. When Lands, diſponed by a Husband to a Wife, are compriſed for his Debt, in his own Time; the Compriſer hath, no Doubt, *Jus Revocandi*, and will be underſtood to have revoked. But if the Debitor ſhould redeem in his own Time, the Donation would revive; but ſtill ſo, as it may be revoked, *niſi morte confirmetur*. And it may be alſo thought, that

that unless the Husband do otherwise revoke, the Wife may redeem, and purge the Comprising, either before or after the Husband's Decease.

Reversions of Comprisings against apparent Heirs.

N. IF Comprisings or Adjudications against apparent Heirs do not expire before they be Twenty Five Years? *Ratio Dubitandi*, That the Act of Parliament is in favours of Minors having Right; and the apparent Heir has no Right: And in Adjudications they renounce to be Heir: And there is no Reason that the Creditor should be prejudged, upon Pretence of Favour to a Person who has no Right.

If the apparent Heir be reponed before he be Twenty Five Years, the Creditor who should adjudge the Reversion competent to him, will consequently be restored.

S. The Act of Parliament provides, That a Comprising shall not expire against a Minor, but run to *Five and Twenty*. And 'tis like, an Adjudication against an apparent Heir, would be in the same Case: For albeit an apparent Heir has no Right, and have also renounced to be Heir; yet, since he has a Reversion, and is Minor, there is *par Ratio*.

The Author says well, That if the apparent Heir be reponed against the Adjudger, before he be Twenty Five Years; a Creditor adjudging the Reversion from him, will have the Benefit of it.

Reversion Personal.

N. Quær. IF a Reversion that is Personal (excluding Heirs and Assignies) may be comprised? *Ratio Dubitandi*, A Comprifer is, upon the Matter, and in Construction of Law, a legal Assigny. And on the contrair, Voluntar Assignations are only excluded; but not Comprising. And there is not *par Ratio*, because 'tis not *in arbitrio* of the Person who has Right of Reversion personal to himself, either to redeem, or not. But a Debitor having Right to a Reversion, ought to satisfy his Debt: And if he will not make use of his Right of Reversion to that Purpose. the Law gives a Remedy, by Comprising.

If the Comprifer of such a Reversion may redeem, after the Death of the Person to whom it was granted? *Ratio Dubitandi*, The Heritor whose Rights are affected with the Reversion, ought not to be in worse Case; at least, as to the Time and Endurance of the Reversion. And the Comprifer, *sibi imputet* that he doth not make use of his Right in Time: And he hath Advantage enough in Law, that the Reversion being Personal, may be comprised.

S. A Reversion conceived personally to a Man himself, excluding Heirs and Assignies, excludes only Voluntar Assignations, but not Comprisings. For, there's no Reason that the Debitor, having Right to a Reversion, should delay to use it in Defraud of his Creditors. And a Comprifer of such a Reversion may redeem, even after the Death of the Reverser. For, the Limitation of the Reversion not excluding Comprisings, the Comprising is a valid, legal Assignation, and takes Place, as if

Comprifer doth only [illegible]

N. If a Reverſion that is Perſonal [illegible] *Ratio Dubitandi*, That the Fiſk is not [illegible] as the Creditor and Comprifer. And yet 'tis to be conſidered, That whatever is competent to the Traitor, doth forfault to the Fiſk: And otherwiſe it would be an Encouragement to commit Treaſon, if ſuch Reverſions and Faculties, being only competent to Parents and Relations, they cannot forfault; ſo that their Children may bruik the Eſtate, notwithſtanding of their Treaſon.

WHEN a Perſon hath Right to redeem Perſonally to himſelf, after the uſing of the Order, he may aſſign: But, *Quæritur*, If, having proceeded to his Order by Premonition, he deceaſs before completing of the ſame, in that Caſe he may aſſign, and the Aſſignay may proſecute the Order? *Ratio Dubitandi*, He has declared his Will to redeem. And yet, on the other Part, *Actus incæptus non habetur pro completo*.

Quid Juris, In ſuch a Caſe, *In Reverſionibus ſimilibus*? And if in any Caſe, *in actibus arbitrariis Facultatis, aliquibi Declaratio arbitrii* be ſufficient?

S. A Reverſion, tho' Perſonal, will nevertheleſs fall under Forfaulture: For, Forfaulture doth certainly reach whatever belongs, or is competent to the Traitor.

A Reverſion only Perſonal, may be aſſigned after the Order of Redemption is uſed: And tho' the Reverſer have not completed the Order in his own Time, but only premoniſh'd; yet, 'tis thought the Aſſignation will be good; ſeeing he hath ſufficiently declared his Purpoſe: And the Order itſelf is but an incomplete Formality; and yet it makes the Reverſion ceſſible. But if after Premonition, the ſame were neglected, or abandon'd, it ſhould not have the ſame Effect.

N. A Reverſion being to a Perſon, and the Heirs Male of his Body allenerly, excluding Aſſignies and other Heirs; *Quæritur*, If it falls under the Forfaulture of the Perſon to whom the Reverſion is granted, as ſaid is? *Ratio Dubitandi*, That all others are excluded, both Heirs of Line and Aſſignies: And on the other Part, the Reverſion is not merely Perſonal, but *Jus Hæreditarium tranſmiſſibile* to the Heirs foreſaid of his Body?

S. THO' a Reverſion be taken to a Perſon and the Heirs Male of his Body allanerly, excluding all other Heirs or Aſſignies; yet it will certainly fall under Forfaulture: For this is much more than a ſimple perſonal Reverſion: And the Rigour of Forfaultures catches all.

N. Quæ Ratio, That a Reverſion granted to a Perſon only, and not to Heirs and Aſſignies; or a Power to diſpone reſerved in the Right granted with the ſame, may be compriſed, and yet doth not fall under Forfaulture? ANSWER, Nothing falls under Forfaulture that is perſonal only, and which is neither *ceſſibile* nor *tranſmiſſibile ad hæredes*: Whereas a Reverſion that is merely Perſonal, tho' it cannot be convey'd by a voluntar Right and Aſſignation, may be compriſed: Seeing by the Compriſing, the Perſon who has the Reverſion his Debt is ſatisfied; and he ought to have made uſe of the ſaid Faculty and Right to that Purpoſe:

the

And seeing he is so sold, that he doth not make use of it; the Law doth justly provide that it may be comprised, and used to that End; which, both in Law and Conscience, he should have used for himself: *Et interest reipublicæ, ut quis re sua bene utatur.*

S. The Author enquires here, *Why a Personal Reversion, excluding Heirs and Assignies; or, A Power to dispone, reserved personally to the Granter, may be comprised, and yet do not fall under Forfaulture?* But the Supposition doth not hold; for both would fall under Forfaulture, as they are comprisable: And the Reason of Difference which the Author assigns, is not good: For, that may fall under Forfaulture, which is neither cessible, nor transmittible *ad hæredes*, if allanerly a Right in the Person forfaulted. And the Reversion is comprisable; because a Creditor should have all that is in his Debitor's Person, whereby his Debt may be satisfied, and so both stand almost on the same Foot.

Legal Reversions competent to Idiots, &c.

N. Quær. If a fatuous Person, or Idiot having Right to a legal Reversion, has the Benefit competent to a Minor, to redeem after his Recovery? Answer, 'Tis thought, Not; seeing by our Law and Custom, Minors, before the Act of Parliament 1621, had not that Benefit: And by the said Act of Parliament, it is given only to Minors; *& exceptio firmat regulam*, &c. And neither can Statutes be extended, nor is there *eadem Ratio*, seeing the Time of Minority is defined: Whereas a fatuous Person may live a very long Time; and 'tis hard that the Creditor should be *in incerto* all that Time, as to his Right and *Dominium*, whether it be simple or redeemable.

If Actions upon Contracts do prescrive against fatuous Persons? Answer, They do not prescrive, *quia non valent agere*: And there is a Difference betwixt Prescriptions of Actions, and of Legal and other limited Reversions: which are only given for a certain Time: Because *Jus limitatum* to a certain Time, *producit limitatum effectum*; *viz.* A limited Action during the said Time. And it being just, and the Comprisers or Heritor's Interest, That the Reversion should be only limited, and for the said Time, *ne Dominium sit in incerto*, as said is; he cannot be in worse Case, by Reason of the Condition of the Party who has Right to the Reversion, being Minor or fatuous. And in effect, by a Reversion, the Comprisers or Heritor's Right, is *Jus resolubile sub conditione potestativa*; and in such Cases, it cannot be pretended that the Party could not satisfy the Condition, being *Minor* and *Fatuus*.

S. 'Tis thought, That a fatuous Person or Idiot, having Right to a legal Reversion, should have the Benefit competent to a Minor, to redeem after his Recovery: For, in this Case, the fatuous Person is in utter Incapacity, and *prorsus non valens*; which gives him a Defence, in common Law. And the Act of Parliament 1621, gave the Defence to Minors, rather by way of Indulgence, because not utterly incapable, and supposed to have the Assistance of Tutors and Curators, and so only for their greater Security. But in the other Case, common Law secures the Person fatuous: And there's no Hardship upon the Creditor, seeing the Reversion is favourable, and the Debt in the mean Time, secure.

The Author says well, That Actions [illegible] against fraudulent Persons, *Jura non sunt dormientibus*. Difference betwixt Prescription of Actions and [illegible] ted Reversions. And 'tis true, That the Law [illegible] mited Reversions) is but *Jus limitatum*, and to produce [illegible] Action. Whereby it may be thought, That the Party [illegible] not be in worse Case by the Condition of the Party [illegible] Reversion his being Minor or fatuous. But seeing [illegible] the running of a certain Space of Time hath an exclusive [illegible] and that this Time should not run, in Equity, *contra non valentem agere*: It still appears reasonable, That what was indulged by the *Act of Parliament* to Minors, should, by the *Common Law*, be granted to Persons fatuous, as above.

Rights made by Dyvours.

N. Quer. WHERBAS by the Act of Parliament anent Dyvours, Rights granted without an onerous Cause, in Prejudice of Creditors, are reducible; without Prejudice always of those who have acquired Rights from the Confident Person *bona fide*: If the said *Salvo* should be extended to Comprisers? *Ratio Dubitandi*, That it appears hard that Creditors should be prejudged, and be in worse Case by the Fraud of their Debitor, and their Action (being competent to them) and *nata* immediately after the fraudful Alienation) should be taken away from them without their own Deed. And yet the said *Salvo* being only in favours of Purchasers, and *favore commercii*, and of these who *bona fide* contract with Persons that are not inhibited; neither they nor their Authors should be excluded: And Comprisers cannot plead the Favour of Commerce, seeing they have not any Commerce nor Contract with a Confident Person, but against their Will, use Execution against what they conceive doth belong to him, which they do upon their own Hazard, and therefore ought not to be in better Case than their Debitor, and cannot have his Right but as he had it, *& cum sua Causa*.

S. THO' the Creditors of a Confident may pretend as much *bona fides*, as the Purchaser from him; yet since the Favour of Commerce makes for the Purchaser, the said *Act* provides for his Security. But as to the Creditor and Comprifer, it seems to leave him to his own Fate, to have his Debitor the Confident's Right, as he finds it. But if the Act of Parliament had not thus provided for the Purchaser's Security, the Creditor of the Confident might have been thought yet more favourable, as acting necessarily for his own Security: Whereas the Purchaser acts voluntarily.

Fraudulent Rights in Prejudice of Creditors.

N. A Debitor, after expired Apprisings, disponed his Estate so encumbred by a Contract, bearing an Obligement, That the Disponer should cause the Comprisers dispone their Right. Or, That it should be lawful to the Buyer to acquire them; and after all should be purged, the Buyer being obliged to pay the Sum therein-mentioned, and accordingly

dingly having payed the same to the Seller? *Quæritur*, If such a Transaction, tho' it cannot be questioned upon that Head, that it is without a just Price, yet may be questioned upon the Act of Parliament, as being without a necessary Cause, and of purpose to defraud Creditors, who had not preferable Rights?

S. There appears nothing to be questioned in this Bargain, seeing the Apprisings were expired. And it seems to be rather a Bargain of Management, than in Defraud of Creditors, the Apprisings being expired, as said is. And the Debitor having no Right left him in his Person. For, the Creditors excluded, were excluded by the expired Comprisings: And by this Bargain, they seem rather to have an Advantage, as having Access to affect the Sum to be payed to their Debitor.

N. If a Person be in that Condition, that his Debt will exceed the Value of his Estate; and because his Condition is not known, and being a Person of Credit he is not inhibited; any confident Friend knowing his Condition, if he should acquire a Right to his Estate in hail or in part, for a Price equivalent, of purpose that he may have a Livelyhood: *Quæritur*, If such a Right may be quarrelled as fraudulent? *Ratio Dubitandi*, That it is for an onerous Cause. And on the other Part, The Clause was not just nor necessary: And 'tis presumed, That the said Course was taken in Defraud of the Creditors.

S. Tho' a Person have Debt above the Value of his Estate; yet if he be not inhibited, any Man may acquire from him in hail or in part for an adequate Price; and there can be no Fraud alledged where there was no legal Restraint upon the Seller, and the Purchaser acquired for a just Price without contrived Conclusion. For, *in omni Negotio fraus expellenda.*

Right a non habente Potestatem.

N. THE King having disponed Land, having fallen in his Hands by Forefaulture; and the Infeftment being past under the Great Seal; the Person to whom it was granted did decease before Sasine; and thereafter another Donator procured a Right under the Great Seal; and was infeft thereupon: *Quæritur*, If the second Gift may be questioned as being *a non habente potestatem*; in respect the King was fully denuded in favours of the first Donator, and nothing could be done more to denude him by himself; and the taking of the Sasin is not the Act of the King, but of the Party: And it could not be imputed to the Donator, that he did not take Sasine, being surprised by Death: And double Rights are forbidden by the Law?

S. When the Soveraign grants double Gifts, the first compleated by Infeftment, is no Doubt preferable; however they may quarrel one another upon the Head of *Obreption* or *Subreption*: But if the first Donatar was invincibly impeded by Death, it were hard to prefer the Second. And yet the Second first infeft, has undoubtedly the preferable Right; and the Soveraign is liable in Warrandice.

Rights *cum Tractu futuri Temporis*.

N. WHEN a Tack of Annuity for certain Years belongs to a Perſon; It does not belong to his Executors, becauſe he had not *Tractum futuri Temporis*: But if he have a Right to the Eſcheat of another Perſon, it will belong to his Executors. To conſider what is the reaſon of the Difference.

S. We had this Caſe before, *viz.* That a Tack for certain Years, as having *Tractum futuri Temporis* belongs not to Executors; and yet will belong to the Donatar of his ſimple Eſcheat, if it be not a liferent Tack. But to me there appears no Reaſon for the Difference: For an Executry ſhould ſtill be more extenſive than a Gift of a ſimple Eſcheat: And Bonds bearing Annualrent would ſeem to have *Tractum Temporis*; yet they fall under Executry, tho' they will not fall under ſimple Eſcheat.

THE Title next to this, Right iu Truſt, *is only a particular Caſe of the King's Diſpoſing upon the Forfeiture of the Marquiſs of* Argile. *And the next Title to that,* Ripæ & Ripatica, *is but* Latin *Citations.*

Quando Dies cedit *in* Graſs-Rooms, *where there is Queſtion betwixt Fiars and Liferenters?*

N. IT being the Cuſtom of the Country in ſome Places, That Lands conſiſting of *Graſs-Rooms*, are yearly ſet from *Whiteſunday* to *Whiteſunday* thereafter, for Payment of a ſilver Duty at *Martinmaſs* after they are ſet; *Quæritur*, Therefore if the Fiar ſurvive the *Whiteſunday*, but dieth before the *Martinmaſs*, if he will have any Part of the *Martinmaſs* Duty? Or if it will belong entirely to the Relict, Liferenter, or next Fiar? Answer, It is thought, That he, nor his Executors would have no Part of that Duty, being paid for the ſaid Year, betwixt *Whiteſunday* and the next enſuing *Whiteſunday*: Seeing he deceaſed (as ſaid is) before *Dies* either *ceſſit* or *venit*.

In ſome places *Graſs-Rooms* are ſet from *Whiteſunday* to *Whiteſunday*, but the Term of Payment is *Candlemaſs* and *Lambmaſs*. *Quæritur*, If the Fiar deceaſe after *Martinmaſs* after it is ſet, but before the firſt Term of Payment; if he will have any Part of that Duty? Answer, It is thought he will have the Half; and whatever be the Term of Payment, *Dies cedit* at *Martinmaſs*, for the half Year preceeding.

Seeing for the Duty of Corn-lands, though payable betwixt *Yule* and *Candlemaſs*, yet *Dies cedit* at *Whiteſunday* and *Martinmaſs*, as in the Queſtion foreſaid: *Quæritur*, What is the Reaſon of ſo great Difference betwixt theſe and Graſs-Rooms? Answer, That the Duty being paved for the Cropt, the Terms of *Whiteſunday* and *Martinmaſs* are reſpected; ſo that the Fiar ſurviving *Whiteſunday*, his Executors have Right to the half of the Year; upon that conſideration (as appears) becauſe the Lands are then fully laboured, and ſowen; and whoever ſurvives *Martinmaſs* has Right to that Term's Duty, becauſe the Cropt is then fully collected: But as to Graſs-Rooms ſet, (as ſaid is) at *Whiteſunday* to *Whiteſunday* there-

thereafter [illegible] upon the Matter in the Crop [illegible] the Duty of the whole Year is paid at [illegible] that before *Martinmaſs* the Graſs-profits are [illegible] by [illegible] their Wool and Beaſts, at or before that Time,

Quæritur, If the Fiar deceaſe after *Martinmaſs* and has not uplifted the Duty, [illegible] ſame divide betwixt him and the Liferenter? And if he has uplifted the ſame, if his Executors would be liable to refound the Half to the Liferenter? Answer, *Cognitandum*. For if it be not uplifted it appears reaſonable that the Liferenter ſhould have the Half, and if it be uplifted, it appears hard that the Fiar having uplifted the ſame *Jure ſuo & bona fide*, ſhould be liable to render any part of the ſame; ſpecially ſeeing the Liferenter may have the ſame Advantage if ſhe ſhould deceaſe after *Martinmaſs*.

If Corn-Rooms ſhould be ſet in the ſame Terms, That the Duty ſhould be paid at *Martinmaſs* after they are ſet, *Quid Juris?* Seeing the ſaid Payment will be before the next Cropt, and the Fiar may die before both the Terms of the next Year, for which the Duty is due? Answer, It is thought that the Fiar cannot ſet the ſaid Lands in manner foreſaid, in prejudice of the Liferenter: And if the Tennent take the ſame that Way, it is upon his own Hazard; and the Liferenter would force him to pay the Duty, after the ordinary Terms of the Country.

Quæritur, If a Tennent have a Liferent-Tack, and he die after *Whiteſunday*, If the Tack will not continue for that Year? Seeing the Time of removing of Goods neceſſary for labouring is paſt before his Deceaſe, and Rooms being ſet from *Whiteſunday* to *Whiteſunday*, *annus cæptus*, as to labouring *habetur pro completo. Vide Annuum Legatum.*

Quæritur, If there be not the ſame reaſon as to Liferenters, in Labouring or poſſeſſing the Land with their own Goods, ſeeing their Executors cannot remove the Goods after that Time, and the Year of the Liferent is begun?

S. WE had this Caſe before. A Graſs-Room being ſet from *Whiteſunday* to *Whiteſunday*, for Payment of a ſilver Duty at *Martinmaſs* after the Set; If the Fiar die betwixt *Whiteſunday* and *Martinmaſs*, the Liferenter will enter to the *Martinmaſs* Duty, and it will not fall to the Fiar's Executors: But the reaſon offered by the Author, that the Fiar (deceaſing as ſaid is) deceaſed before the *Dies*, either *ceſſit* or *venit*, is neither true nor neceſſary: Not true, becauſe *Dies cedit* after the *Whiteſunday* when the Set was made, altho' not *venit* till after the *Martinmaſs*: But, that *cedit*, as ſaid is, is certain; for after the *Whiteſunday* it may be arreſted by a Creditor; and yet it muſt fall to the Liferenter, becauſe the Liferenter's Right takes Place at and after the *Martinmaſs*, and ſo fruſtrates the Arreſtment for the Fiar's Debt which is no Singularity.

And when the Graſs-Room is ſet from *Whiteſunday* to *Whiteſunday*, and the Terms of Payment is *Candlemaſs* and *Lambmaſs*; if the Fiar deceaſe after *Martinmaſs*, but before *Candlemaſs*, his Executor will have the half of the Year: And the Author ſays, *Becauſe* Dies cedit *at* Martinmaſs: But the truer Reaſon is, That *Martinmaſs* and *Whiteſunday* are the legal Terms, which regulate this Caſe without reſpect to the Conventional.

The Author Inquires what ſhould be the Reaſon of Difference betwext Corn-Rooms and Graſs-Rooms. But, tho' in Graſs-Rooms, the Lands be laboured and ſowen before the *Whiteſunday*; and that in Graſs-

Room, the Grass [illegible] not, nor yet the Effect the Difference [illegible] both Grass and Corn are ever before the [illegible] Grass-Rooms [illegible] Rooms, the Fiar dying after the *Whitesunday*, will have the [illegible] after *Martinmass*, the Whole: And to the Liferenter in the [illegible] will have the other Half; but in the *Second*, will get [illegible] Year preceeding: But it should be considered, That Rooms may be sometimes Grass, sometimes Corn, oftentimes mixed: But that being in a Course of Setting, the *Whitesunday* and *Martinmass* are always reckoned the legal Terms for the Fiar and Liferenter.

The Author's next Question is, *If the Fiar decease after* Martinmass, *will the Duty divide betwixt him and the Liferenter?* But ordinarily it is answered, That in this Case the Fiar or his Excutors have the whole Year preceeding *Martinmass*: And even here the Author says nothing of his Corn-Room or Grass-Room; but subjoins, If Corn-Rooms should be set in the same Terms, that is from *Whitesunday* to *Whitesunday*, and the Duty payable at the *Martinmass*: He thinks this Payment will be before the next Cropt; and that the Fiar may die before both the Terms of the next Year, for which the Duty is due: But we see that most Rooms are set at *Whitesunday*, and tho' the Entry of the Corn-land be not till *Martinmass* thereafter; yet in the Tract of Setting, whether they be Corn-Rooms or Grass-Rooms, the legal Terms still take Place betwixt the Fiar and the Liferenter; and as the Liferenter's *Entry* is, so is the *Issr.*

If a Tennent have a Liferent-tack, and die after *Whitesunday*, yet the Tack will continue for that Year till the next Term of Removing: But if a Liferenter labour or possess Lands with her own Goods, the Liferenter dying after Sowing, will have the Cropt, *quia Messis sementem sequitur.* But for Grass, her Right determines with her Life.

S.

Act Salvo.

N. Quær. IF Ratifications in Parliament, with the Clause, *That they should not be liable to the general Salvo*, Will prejudge a third Person having undoubted Right, and having been secured by a general Law, *viz.* The Act *Salvo Jure*: The Ratification being only a private Act, and the Persons concerned not being called?

S. A Ratification in Parliament, with a Clause, *That it should not be liable to the general Act Salvo*, will yet operate so as the Ratification cannot be questioned, save in Parliament; for, tho' the Ratification be private, and the general Act *Salvo*, publick; yet the Authority of Parliament is the same.

Sasine

Saſine.

N. A Poſterior Saſine, but firſt Regiſtrate, whether will it be preferred to the prior Saſine Regiſtrate thereafter tho' *debito tempore*?

S. A Poſterior Saſine Firſt regiſtered, will be preferred to the prior Saſine regiſtered thereafter, tho' *debito tempore*. But this happens by Vertue of the late Act of Parliament 1693, preferring real Rights according to the *Date* and Priority of the Regiſtration of the Saſines. And yet, ſince the *Date* is here mentioned, it may be thought, That the Firſt Saſine if duly regiſtered; tho' after the Regiſtration of the Second, ſhould yet have the Preference, as it would have had before that Act: For, there being a Latitude of Sixty Days for the Regiſtration of Saſines; it ſeems, the Firſt Saſine, which certainly is the legal Tradition, if duly regiſtered within the Sixty Days, tho' it may be, after the Regiſtraton of the Second, ſhould yet have the Preference.

Regiſtration of Saſines.

N. IF a Saſine of Reverſion granted by a Biſhop will militate againſt the Succeſſor, albeit it be not regiſtrate in the Regiſter of Saſines? *Ratio Dubitandi*, The Biſhop doth not ſucceed as Heir: And yet he cannot be ſaid to be a ſingular Succeſſor: And Biſhops, they are *Corpora ſingula*.

S. A Saſine not duly regiſtered, is null by Act of Parliament, except againſt the Heir of the Granter, as to whom only 'tis good; becauſe he cannot quarrel his Author's Deed: But it will not hold as to a Succeſſor in a Benefice; becauſe he doth not repreſent his Predeceſſor.

Special Services, and Precepts of Clare conſtat.

N. A Perſon being ſerved Heir Male, or of Proviſion in ſpecial, in certain Lands, and deceaſing before he be infeft: *Quæritur*, If his general Heirs will be liable to the Debt of that Perſon to whom he was ſerved Special Heir?

THE ſame Queſtion may be moved upon a Precept of *Clare conſtat* whereupon Infeftment has not followed; ſeeing in neither of the ſaid Caſes there is *Aditio Hæreditatis* before Infeftment: Whereas in general Services, there is *Aditio* as to any Eſtate whereupon there is no Infeftment?

S. A Perſon being ſerved Heir Male, or of Proviſion in ſpecial, in certain Lands, and deceaſing before he be infeft; his general Heir will not be liable to the Debt of the Perſon to whom he was ſerved Special Heir. And ſo in the Caſe of a Precept of *Clare conſtat*, whereupon Infeftment has not followed. For, in both Caſes, the Special Service and Precept do evaniſh; and there's no *Aditio*: But if there be a General Service; that is an *Aditio*, and completes the Repreſentation, and ſo tranſmits the Debt *paſſive*.

Servitude,

N. 5. If a Person who has Right to a Servitude of [illegible] should acquire also *Prædium Serviens*, [illegible] he has Right, both to *Prædium Dominans* & [illegible] doth extinguish; *Quia res sua nemini servit?* And if [illegible] ter dispone *Prædium Serviens*, whether the said Servitude not [illegible] served? either he, or his singular Successor in the [illegible] Lands can claim the same? Or, if he should dispone *Prædium Dom[inans]* *nans*, without Mention of the Servitude, but with all Liberties and Pertinents; Whether will that Servitude revive, as being only *sopita* for the Time, while both Lands belonged to One Person, but not extinct by any Discharge, or Deed freeing the Lands of the same?

If a Person has constitute by Writ a Servitude, and thereafter dispone his Lands, without excepting of the same: *Queritur*, If it will militate against a singular Successor? Answer, Such *Jura Hæreditaria* which are *in rem*, *non transferuntur nudis pactis*, *sed traditione*; and by Possession, which is *instar traditionis*: But if the Servitude be *discontinua*, as *v. g.* the leading of Sea-Ware, which is not done but at a certain Time of the Year: *Queritur*, What shall be done to perfect the Constitution? *'Tis thought*, it may be publish'd by making Intimation thereof to the Tenents, and at the Paroch-Church, and upon the Ground: And the Granter, if need be, may be inhibited.

Si alicui Jus hauriendi & adeundi concessum est, utrumq; habet: Situm hauriendi inest aditus: Si tantum adeundi ad fontem inest, & haustus: aliquo enim concesso, omne illud sine quo hoc Jure uti nequimus, concessum intelligitur. Jus Fluviat. p. 89. initio.

Aut vicini aquam hauserunt, Jure Familiaritatis, aut Jure acquisito: hoc casu cogi nequeunt, ut in fonte mutationem admittant; illo, possunt. Idem, p. 90. n. 40.

S. If a Person who has a Right of Servitude out of other Lands should acquire the *Prædium serviens*, and thereafter dispone the same; the Servitude will cease: And the true Reason is, Because he disponed *for all Right, Title or Interest*, &c. which imports a Discharge of the Servitude. And yet if a Man be Heritor of a Miln, and have a Servitude upon a neighbouring *Fundus*, thro' which his Mill-lead runs; albeit he should acquire that *Fundus*, and afterwards dispone it, even *for all Right, Title*, &c. 'tis thought it would not make the Servitude of the *Aqueduct* to cease, unless it were expresly discharged: For it could never be judged to be the Meaning of Parties, That the Heritor of the Mill, by disponing the *Prædium serviens*, should destroy his own Mill.

But put the Case, The *Prædium Dominans* is disponed, no Doubt, it carries the Servitude as a Pertinent. But a Servitude sopite by the Confusion, would not in this Event, revive, if once extinguished: For in the Case above of a Mill *dominans*, and a *Prædium serviens*, 'tis already said, That the Aqueduct is not extinguished.

A Servitude being constitute by Writ, and cled with Possession, will militate against a singular Successor: And tho' the Servitude be *discontinua*, as the Leading of Sea-ware, which is only done at a certain Time of the Year; yet if it be publish'd and intimate upon the Ground, it will hold good against a singular Successor.

Lords

…ession had
…as to
…ty fore-
…by the Clauſe with the ſame Power, is to
…underſtood as …ſame Priviledges belonging to Judicatories and In-
…porations *ejuſdem*; and not as any extraordinary Power and Pri-
…ege: As if a Burgh ſhould be endued with the ſame Priviledges belong-
…g to any Burgh within the Kingdom; they will not have Right to be
…heriffs within themſelves, by reaſon other Burghs have that Right, *non*
ens Burga; but by a ſpecial Privilege. And ſome Lords of Regality do
…retend to the Eſcheats of the Perſons within their Regality, upon Horn-
…ing; and yet a Right of Regality, by the general Clauſe will not carry
…the ſame.

If the Lords of Seſſion be to be conſidered as Judges only, or Magiſtrates, & *Prætores habentes Imperium*, in ſome Caſes?

S. The Queſtion, *If the Lords of Seſſion have Power to judge* Appellatione remota? is now determined by the Claim of Right, allowing Proteſtations for Remede of Law.

The Lords of Seſſion have not only their Juriſdiction with a ſubſervient *Imperium*; but in many Caſes, have an *Officium nobile*, and an *Imperium* correſponding; which is only to be defin'd by Cuſtom.

Sheriffs.

N. If Precepts of Sheriffs may be put in Execution by their Officers, after their Death?

S. The Decreets of Sheriffs do ſubſiſt after their Death: And their Precepts to make Payment, are in effect Decreets; which therefore it ſeems, may be put in Execution after their Deceaſe.

Ships.

N. If, a Ship being Abroad, *Traditio Inſtrumentorum* (to a Buyer, *viz.*) of the Vendition, be ſufficient?

If a Ship be poindable, & *quomodo*?

S. A Ship being Abroad, is judged with us, to be ſold *effective*, by a Vendition, or, by aſſigning the Vendition. But no Doubt, an actual Tradition is the more legal and perfect Way. And the Cuſtom of the Place ſhould alſo be regarded.

A Ship is reckoned moveable, and conſequently, may both be arreſted and poinded. But Poinding in this Caſe, not being ſo ordinary, the Ship may be Firſt arreſted, and then made furthcoming, or brought to a Sale by a Sentence of the Admiral.

The next Title, Solarium, *is but a* Latin *Citation.*

Sponſalia

N. [illegible], after a Solemn Contract of M[illegible]
ry otherwise; Wi[illegible]
upon the ſaid Contract of Marriage [illegible]
and *Sponſalia, inducunt Jus ad rem*, as in [illegible]
Diſpoſitions anent Lands; but not *in re*, [illegible]
riage, is only when *ſequitur Benedictio ex facie* [illegible]

If *Sponſalia* be conſummate, and purſuit [illegible]
being intented for Solemnizing the Marriage, and Declaring the Iſſue lawful, the Defender die in the *Interim*; May the Purſuit be transferred in favours of the Wife and Children, *ad hunc effectum* at leaſt, That ſhe may have *Jus Relictæ*, and they be Heirs and Executors to their Father? *Eadem eſt quæſtio*, as to Promiſe and *Copula*.

S. After a Solemn Contract of Marriage, and a Proclamation likewiſe, Parties may reſile. And actual Marriage is only when celebrate *per verba de præſenti*, or, when *Concubitus* follows.

When *Sponſalia*, or Promiſe of Marriage is conſummate *per Copulam*, and a Purſuit intented for Solemnizing, and declaring the Iſſue lawful; tho' the Defender die, the Purſuit may be transferred in favours of the Relict and Children, to have the Marriage declared, and ſo ſuſtain their Rights.

The next Title, Statuta, *is but a Citation.*

Steelbow and Heirſhip.

N. WHETHER, a Room being ſet in Tack for certain Years, with Steelbow-goods, as Oxen, *&c.* will the Steelbow-goods belong to the Heir who has Right to the Tack; or to the Executor? *Ratio Dubitandi*, Both the Lands and the Goods are ſet in the Tack, as *Fundus inſtructus*; and the Duty is payable in contemplation of both: So, whoever has Right to the Tack, has Right to both, the Tack being *Jus individuum*. 2. The Goods are like *nativi & aſcriptitii, & addicti glebæ*. 3. What is to lie fixed for diverſe Years, cannot be reckoned *inter mobilia*. 4. It were hard to think that a Relict and Bairns ſhould have their Legitime out of Goods that are not in the Poſſeſſion of the Defunct, nor would be for diverſe Years. And it would ſeem, That *eadem eſt Ratio* as to the Setter of the Tack, and his Heirs and Executors.

Pecora dantur in ſocidam, cum animalium caſus in Paſtorem transfertur; qua conventione, pecora ferrea effici & appellari ſolent; quod fit in multis provinciis Germaniæ; *ubi cum fundo, certus numerus ovium & vaccarum in feudum dari ſolet; ita ut vaſallus, feudo finito, eundem numerum ſupplere & reſtituere teneatur*. Beſold. Theſ. in verbo *Eiſern Biehe*. lit. *E*. p. 224.

S. A Room being ſet in Tack for certain Years, with Steelbow-goods, theſe Steelbow-goods will belong to the Perſon who has Right to the Tack, whether Heir or Executor to the Tackſman: For, the Tack is of a *fundus inſtructus*, and comprehends the Steelbow, as the Lands ſet.

But

...belong to the Set-...
...Thir they still belong, ...
...Executors, but without ...
...ince the Right of the Tack, and ...
...with the Lands, to his Heir; ...
...Thir the Goods given by him in Steel-bow, should be thought to be subjected to that same Destination.

Strangers, See Process against Strangers, lit. P.

N. ALL Nations are *Municipia*, and the World a great *Civitas*: They have that Relation and Necessitude, that *officia sint*, and owe Justice to all Persons of whatsoever Nation, according to the Law of the Place where they contract, with respect to that Place; *sibi enim legem dixerunt*: If Justice be refused, *datur remedium pignorationis, seu Represseliarum.*

S. 'Tis true, By the Law of Nations, all Persons ought to have Justice done them against their Parties, where they find and attack them; and that this Justice should be done, in the Execution of personal Contracts or Bargains, according to the Law *Loci Contractus*: But if it tend to affect the Lands or *Res Immobiles* where the Party conveened, lives; it must be according to the Law of their *Situs*. But this general Distinction needs Explication, and may vary in the Application of it.

N. If *Mobilia* or *Nomina* belonging to Strangers (*v. g.* in *England*) should be confirmed here? Or, If it be sufficient they should be confirmed in *England*? *Ratio Dubitandi, Sequuntur personam*: On the other part, They are a *Scotish* Subject or Interest.

S. We met with this before: And 'tis still thought, That *Mobilia* or *Nomina* in this Country, belonging to Strangers, do transfer according to the Law of the Country where the Owner resides and dies; *quia sequuntur personam.*

Subjects living Abroad.

N. A Native living Abroad, and being Popish, and going to the Mass where he liveth, *Quæritur*, Whether he forfaulteth his Estate in *Scotland*?

Item, If he intercommune there with Persons forfaulted in *Scotland*; whether he be liable, as having contraveened the Law of *Scotland*; so that if he have any Estate in *Scotland* it may be affected?

If a Prince may command a Subject living Abroad under his Enemy to retire and come home? And if he disobey, may he be proceeded against, and be divested of any Fortune and Liberty competent to him as a Native?

Quoties Rex, Princeps, vel alius, in alterius Regis vel Principis Territorio bona habet & possidet, ratione quorum, Juramentum fidelitatis præstare solitus est; per hoc non efficitur, ratione suæ personæ, seu personali obligatione, subditus aut subjectus; nec quoad personam sortitur forum nisi secundum quid; ita ut pro tali possessione bonorum conveniri possit, coram

S. It were hard so make a [illegible]
Man, there, to [illegible]
for *Scots*-Man in *Scotland* [illegible]
der, or Treason committed [illegible]
Law of Nations, and wherever prosecuted [illegible] as
for Treason, it can hardly be prosecute as such, unless the Delinquent be found here at home: But if he be found here, the Treason committed Abroad will affect him: Yet till he goes to Wars, or [illegible] Abroad, seems not to fall under the Pain of our Law.

Tho' a *Scots*-Man Abroad, should intercommune there with Persons forfeited in *Scotland*, he cannot be liable as if he had intercommuned in *Scotland*, to infer any forfeiture, or so much as Punishment: Because the Law of *Scotland* forbids only intercommuning in *Scotland*, which is possible to be observed, and expedient for the publick Safety; but intercommuning Abroad is scarce possible to be evited, and concerns not the publick Safety. 'Tis true, intercommuning Abroad with Traitors in treasonable Practices, is no doubt criminal; but this is not to be presumed, but ought to be proven. And for a *Scots*-Man, simply intercommuning Abroad with Rebels, nothing save the Rigour of the *late Times* could have made it criminal.

A Prince may command all his Subjects Abroad, tho' under his Enemies, to retire and come home; and if they disobey, they may be deprived of all Rights and Liberties in their Native Country: For, this Duty of *Obedience* follows their Birth.

Substitutes.

N. A Bond for a Sum of Money being granted to *Sempronius*; and failzieing of him by decease to *Titius*, and *Titius* his Heirs and Assignies: *Quæritur*, Who is Fiar? Answer, The first Person: *Titius* being only substitute, failzieing of him by decease; and Successor *in spe*.

Quæritur, If *Sempronius* may dispose of the said Sum by Testament as he may *inter vivos*? *Ratio Dubitandi*: That *Titius* is substitute by a Deed *inter vivos*. Answer, It is thought, he may: Seeing such Deeds are upon the Matter *Donationes mortis causa*; in which *voluntas est ambulatoria*.

Quæritur, If the said Substitute will be liable as Heir of Tailzie? *It is thought*, he should be liable; seeing, if there were an Infeftment in the Terms foresaid, the Substitute could not succeed but as Heir of Provision.

If a Bond bearing the Substitution foresaid be registrate: *Quæritur*, If the Substitute (being named as said is) may charge thereupon? Answer, It is thought: not; because the Bond being registrate, is a Decreet as to the first Person: But the Substitute having only right, *instar hæredis* by Succession; he cannot charge no more than an Heir of Provision.

S. We had this Case before: And it was answered, That *Sempronius* is certainly Fiar. And that, tho' the Bond will transmit to *Titius* by

Subſtitution in Bonds.

N. A Bond being granted to the Creditor, and failzieing of him by Deceaſe, to another Perſon: *Quæritur*, If the Perſon ſubſtitute will be liable to the Creditor's Debt, at the leaſt, *pro tanto*; ſeeing the Sum was *in bonis*, and his Debt ought to be ſatisfied out of his Eſtate?

If ſuch Bonds may be altered by the Creditor, not by uplifting, which he may do, being Fiar; but alſo by changing the Bonds, and taking the ſame to himſelf and any other Perſon, or to his Heir? Seeing the Bonds ſeem to be a perfect Donation in Favours of the Subſtitute: And on the other part, They may be thought *mortis cauſa*.

If the Creditor may diſpoſe of ſuch Sums by Teſtament?

A Bond being granted by diverſe Perſons to my Lord *Dundonald*, and failzieing of him by Deceaſe, to his Son the Lord *Cochran*, his Heirs and Executors: And after the Deceaſe of Sir *John Nicolſon*, One of the Debitors, he having taken a Bond of Corroboration from his Brother Sir *William* to himſelf; and failzieing of him by Deceaſe, to his Grandchild, then Lord *Cochran* (his Father being deceaſed) *Quæritur*, Seeing the Firſt Bond ſtands as to the reſt of the Debitors; Whether the Lord *Cochran* his Father's Executors will have Right to the ſame? And, What Courſe ſhall be taken to get the Right of the former Bond ſettled in *Cochran*'s Perſon?

Quæritur, If, the former Bond being moveable; and in the Bond of Corroboration there be an Obligement to infeft; the Nature of the Sum as to the former Quality of Moveable, be altered?

A Bond being granted to *Robert Selkirk* Merchant in *Edinburgh*, and *Katherine Inglis* his Spouſe, the longeſt Liver of them Two in Conjunct-Fee; and failzieing of them both by Deceaſe, to *Robert Selkirk* their lawful Son, and to the Bairns lawfully to be procreate of his Body; which failzieing, to the other Heirs lawfully procreate, or to be procreate betwixt the ſaid *Robert* and his ſaid Spouſe: Which all failzieing, to the ſaid *Katherine Inglis*, her own neareſt and lawful Heirs, Executors or Aſſignies: With this Proviſion, That it ſhall be leiſum and lawful to the ſaid *Robert Selkirk* elder, at any Time during his Lifetime, *vel in articulo mortis*, by himſelf alone, to uplift, diſcharge, or otherwiſe aſſign and diſpone the Sums in the ſaid Bond, in Hail or in Part, to any Perſon or Perſons he ſhall think expedient; and to make and grant all Writs, Rights and Securities requiſite thereanent, in due and competent Form, without the Conſents and Subſcriptions of the ſaid *Katherine Inglis* his Spouſe, and *Robert Selkirk* Son or his foreſaids, had or obtained thereto in any Sort.

[illegible] the ſaid *Robert Seltirk* [illegible] the ſaid *Robert* [illegible] Right to the ſaid Bond [illegible] [illegible] preſerving the Fiar? [illegible] ar, becauſe the Right of Succeſſion [illegible] Perſons in Conjunct-fee, and the Heirs [illegible] whoſe Heir the Sum is provided, is underſtood [illegible] there are diverſe Degrees of Subſtitution of the [illegible] the Perſon whoſe Heirs are Firſt ſubſtitute [illegible] Heirs ſubſtitute in the Firſt Place, and the other Heirs of any other Perſon ſubſtitute after them, will be Heirs of Proviſion to him: As when a Bond is taken to a Husband and his Wife, the longeſt Liver of them in Conjunct-fee, and to the Husband's Heirs; with ſailzieing to the Wife her ſelf and her Heirs; tho' the Right of Succeſſion to the ſaid Bond doth terminate upon the Wife and her Heirs, yet the Husband will be Fiar, both as *dignior*, and becauſe the Right of the Sum will pertain to his Heirs in the Firſt Place; and to the Wife and her Heirs only upon their Failzieur, and as Heirs of Proviſion to them: And *therefore* in the preſent Caſe, the Money being lent by the Husband, and being provided after his Deceaſe to his Son *Robert*, and the Heirs of his Body; whilk failzieing, the Heirs of the Marriage betwixt the Husband and the Wife; and to the Wife's Heirs, only in the laſt place. 'Tis thought, That her Husband is Fiar, and that the Wife and her Heirs will only have Right as Heirs of Proviſion unto him. And if *Robert* ſhould have had Children, or, if there had been other Children to the ſaid *Robert* elder by the ſaid *Katherine*; it were abſurd that they ſhould have had the Right of the ſaid Sum which was lent by the Husband, not as Heirs to him, being their Grandfather or Father, but as Heirs to the ſaid *Katherine*, being their Mother or Grandmother; or that the ſaid *Katherine* ſurviving her Husband ſhould, have Power as Fiar, of diſpoſing the ſaid Sum; or to have given it to a Second Husband, in Prejudice of the ſaid *Robert* her Son, or the Heirs of his Body, and the Heirs, if there had been any thereafter, procreate of her Husband and her, tho' deſcended of both.

If it be found by the Lords, That either the ſaid *Robert Seltirk* elder, or his Son *Robert* was Fiar; the ſaid *Katherine* muſt be ſerved Heir of Proviſion to the Fiar.

S. When a bond is granted to a Creditor, and failzieing of him by Deceaſe, to another; The Subſtitute will be liable to the Creditor's Debt; but only *pro tanto*. And tho' the Subſtitute ſhould be obliged to ſerve Heir of Proviſion in general, it ſhould operate no farther; beſides that now he may do this *cum beneficio Inventarii*.

If the Creditor in ſuch a Bond ſhould alter the ſame, tho' not by uplifting (as he may) but only by changing it; or by taking a Bond of Corroboration to himſelf, and to another diſtinct Perſon, or even to his Heirs; it vacates, and changes the Firſt Subſtitution: For [illegible] a *Donatio mortis cauſa*. And 'tis already ſaid, That the Creditor may diſpoſe of the ſame by Teſtament.

When

by Inferment, the Sum will become heritable.

Thus Author seems clearly to think, that if in short this; There is a Bond granted to *Titius* and his Spouse, the longest Liver of them Two, and failzieing of them by Decease, to *Titius* their Son and the Heirs of his Body, which failzieing to the other Heirs that should be procreate betwixt *Titius* and his Spouse, which all failzieing, to the said Spouse, her own nearest and lawful Heirs and Assignies: And the Bond further provides, That *Titius* should have full Power of it during his Life: There can be no doubt that *Titius* is Fiar of the Bond; and if the Succession, through the failzieing of *Intermediates*, should fall to the Spouse and her Heirs, she or they must be Heirs of Provision to *Titius*; and if it was a moveable Bond, and the Spouse substitute as said is, she might upon the Devolution charge for the Money summarly.

Substitution in Legacies.

N. A Legacy being left to a Person, and failzieing of him by Decease, to another; *Quæritur*, What the Import of that Substitution is? ANSWERED, That it is *Substitutio Vulgaris*; and that the Effect of it is, That if the Legatar die before the Testator, so that the Right do not take Effect in his Person, it should belong to the Substitute: But that is not *fideicommissaria*; so that the Legatar dying after the Testator, it would belong to his Executors, and not to the Substitutes.

S. WHEN a Legacy is left to a Person, and failzieing of him by Decease, to another: The Effect of it is, That if the *Legatar* die before the *Testator*, it will belong to his Substitute; but if it fall once to the Legatar after the Testator's Death, *the Author thinks*, it should belong to his Executor, and not to the Substitute. But it may be thought, That the Substitution should exclude the Executors; for tho' it may be judged to be but *substitutio vulgaris*, which evanished upon the Succession of the Legatar infitute, yet with us, it would fall otherwise. For, if a Legacy were left to a Person and the Heirs of his Body, which failzieing, to another and his Heirs; the Legatar might certainly freely dispose upon it: But if he did not, it would not fall to his Executors failzieing Heirs of his Body, but to the Substitute; and there appears to be *par ratio*. For, in a Word, any express Substitution or Destination should (with us) exclude the legal Succession, as being the express Will of the Proprietor. *But this needs farder Consideration.*

Successio in Maternis.

N. A Grandfather upon the Mother's Side, having the Title of his Decease Two Daughters, and Children of a Third Daughter; *Quæritur*, If the Two Daughters will only succeed, and exclude the

joribus conſtituta ſunt.

Is the Children of the deceaſt Daughter ſhe ſucceed [illegible] if the deceaſt Daughter has left Sons and Daughters; [illegible] Son of the ſaid Children will ſucceed to their Grandfather? Or, If the Children will be Heirs Portioners as to their Mother and [illegible] for the ſame Reaſon that their Mother and [illegible] That they are *ſuæ familiæ*; *a fortiori*, they who are not *in familia* at all ought to be Heirs Portioners. ANSWER, 'Tis thought, That the eldeſt Son of the deceaſt Daughter will ſucceed as Heir Portioner with his Aunts: And the Law doth favour not only Families as to Preſervation, after they are conſtitute, but likewiſe as to their Conſtitution: And the eldeſt Son, albeit he be not *in familia materna*, may Conſtitute, and be a Head of a Family of his own.

S. WHEN a Man leaves Two Daughters, and Grandchildren by a Third deceaſed; there can be no Doubt, but as to Heritage the Children of the Third will repreſent their Mother, and come in for her Part with their Two Aunts, and ſo be Heirs Portioners with them to their Grandfather; which is a clear Succeſſion *in Paternis*. And farther, if the Daughter deceaſed left both Sons and Daughters; her eldeſt Son would come by Repreſentation, in his Mother's Place: For in Heritage, our Law admits Repreſentation, and always prefers Heirs Male to Females: So that theſe Things needed not to have been doubted.

The next Title, Succeſſio in Stirpes, *is but a Citation.*

De Succeſſione in feudo amiſſo, & quo jure cenſenda, utrum Hæreditatis an Conquæſtus?

" *N.* QUÆRITUR de Feudo amiſſo & reverſo, Quo Jure cenſen-
" dum ſit, utrum Hæreditatis an Conquæſtus; & de omnibus
" commiſſi ſpeciebus competit, ſive ob Alienationem, ſive Diſclamatio-
" nem, ſive Purpreſturam vel Baratriam, aut qualemcunque Feloniam, a-
" liudve delictum, feudum apertum dicatur? Sed quia Recognitio fre-
" quentiſſimus apud nos feudi ex commiſſo vindicandi modus increbuit,
" de ea & praxi noſtra maxime ſolenni, & textui accommodatiori, quæ-
" ſtionem agitabimus: Deciſionem ad reliqua commiſſa indiſtincte por-
" rigendam præfati. *Quæritur* igitur, Cum Superior feudum per Re-
" cognitionem ſibi aſſeruit, utrum feudum Recognitum poſt obitum ipſius,
" ut conquæſtus aſcendat; An verò, ut hæreditas cum feudo dominanti
" deſcendat; poſito feudum dominans hæreditarium eſſe?

" *Quæſtio* hæc in ſe difficilis, & graviſſimas conſequentias ſecum tra-
" hens, haud æquali tamen difficultate in omnibus Recognitionis ſpecie-
" bus laborat. Quod ut pateſiat, ſciendum duas apud nos invaluiſſe Re-
" cognitionis ſpecies, ex cauſarum diverſitate diverſas; unam, ob defe-

" ctum

[illegible] & hæredibus masculis [illegible] masculis; vasallo mortuo, nec ullo [illegible] dente fœdo dominus feudum ab hæredibus [illegible] denlibus, revocat; & hanc feudi revocationem *Balterus* Recognitionem vocat, & ejus praxin prodidit, in Tractatu, *De Recognitionibus, latam 18 Decemb.* 1506. *Regi Advocato agente* contra *[illegible] & Margaritam Auchtrans hæredes, alteram tallie, alteram [illegible]*. Et hoc genus Recognitionis etiam in feudis *Francis* locum habet: feudo hac ex causa revocato: etsi dubitari posset, utrum in persona domini ad quem revertitur, Hæreditatis an Conquæstus naturam induat: certum est, eodem jure quo feudum dominans censeri, eandem naturam & qualitatem sortiri respectu successionis; & omni alio respectu, qui ex distractione & divisione proprietatum, seu Hæreditatis & Conquæstuum, secundum nostram consuetudinem posset emergere. Quin etiam, hoc casu non solum dominium directum dominium utile attrahit, sed possessio civilis possessionem naturalem advocat; adeo ut Dominus directus possessionem nactus, non dicatur novam adeptus, sed veterem continuare possessionem, astipulantibus omnium Doctorum suffragiis, *in L. clam possidere*, ff. *De acquirenda vel amittenda possessione*. Et hæc feudi extincti redintegratio, adeo æquitate & ratione subnititur, ut fiat in eodem qualitatum statu quibus feudum dominans afficitur, tam quoad usumfructum. *ff. de Usufructu*; quam hypothecam *L. si fundus in principio* ff. *de Pignor*. Et servitutes ex fundo dominante debitas, idque optimo jure, quia accessio per modum unionis coiens, eandem prorsus rem constituit, & re cui nititur, omnes suas qualitates ei impertitur. *L. 26. ff. de Pact. Dotal.* Atq; hæc Decisio, firmissimo & irrefragabili argumento nititur; Quod domino utili, quod per infeodationem a directo discesserat, extincto, & per modum meræ privationis annihilato, nihil domino cedit aut acquiritur; sed Proprietas, quæ, abscedente usufructu, & domino utili eatenus fuerat inutilis; eo peremto, pura & defæcata emergit; ideoq; dominium utile non redit; sed in persona proprietarii quasi recidivum revivisicit, & dominus nil nanciscitur, sed quod ante habebat; sed gravatum jure reali in alium devoluto, eo jure evanescente, illibatum, & quasi purificatum incipit obtinere: sicut cum finitur Emphiteusis vel ususfructus, vel cum res revertitur ad mulierem, soluto matrimonio. *L. in rebus. C. de Jure Dot.* Cum igitur nulla hic sit accessio nec transmissio, sed mera privatio & extinctio, nulla potest esse acquisitio. Argumenta quæ hanc sententiam enervare videntur, quia in alteram recognitionis speciem opportunius & fortius stringi possunt, solvere superfedeo, donec eam absolvero.

Secunda species, quæ, proprie, & *κυρίως*, Recognitionis nomine usu nostro indigitatur, procedit, cum vasallus feudum militare, vel saltem ejus partem medietate majorem, quomodocunque, vel simpliciter, vel sub pacto de retro-vendendo, seu reverhone vendit, domino insscio & inconsulto; vel saltem ita gravat annuis redditibus, aliisve oneribus, ut major pars fructuum quotannis erogetur & exhauriatur: quo casu feudum amittitur, & ad dominum revertitur, ait *Textus*, & mores nostri suffragantur: sed quo jure, utrum hæreditaris an conquæstus, ambigitur, & adhuc sub judice lis est. Certe majori difficultate, &

" videri non potest, cum non jam per vi
" quam per emergen
" jure conventionis hodierno usu omitti
" tur. Adhæc, cum subfeuda in eodem
" consuetudo non necessario cum eo co
" consolidationis & unionis, eadem jura
" quid enim nonnulli sentiant, ex dubitandi
" sionem & consolidationem afferentes. *L.*
" *Papinianus ff. de servitut. urban. prad.* clarissimis legibus rede
" quibus cuilibet rerum suarum moderatio & arbitrium permittitur. *L.*
" *in re mandata C. mandat. L. unic. C. de*
" & trivisli praxi frustra oppedunt. Cohæc enim subsecuta
" superiori empta, in eodem suppositio coire, non tamen uniri; sed in
" casu divisionis ab antiqua hæreditate diremptæ, ad hæredes conquæstus
" transire; Idq; apud nos observatur, & in *Gallia*, ubi Jus consuetudina-
" rium dominatur, expresse sanctum est. *Tertium* & ultimum argumen-
" tum, quod maxime officere videtur ne feuda recognita hæreditas in-
" dicentur, ducitur ab incommodo: Si enim feuda recognita, feudo do-
" minanti virtute consolidationis ut hæreditas accedunt, sequitur feudi
" dominantis annexatione & incorporatione domanio & Coronæ D. Re-
" gis facta, & subfeudo aperto & commisso, subfeudo inquam, quod an-
" te incorporationem elocatum fuerat, post enim, non licet, ne, secuta
" dissolutione, proprietatem semel annexam alio modo quam in Emphi-
" teusin dare. *Constit.* 234. *Jacob. Sext.*) feudum illud domanio accres-
" cere & inalienabile esse; sicut reliquum domanium & patrimonium fis-
" cale & publicum, non tam Principis quam Majestatis & coronæ; nec
" nisi prævia dissolutione posse a Rege disponi; quod absurdum. Nec
" enim serenissimis nostris Regibus denegari debet libertas quam feudi-
" starum Coryphei, *Andreas Isernia* & *Matthæus d' afflictis*, omnibus
" Principibus attribuunt in *L. Imperial. § Præterea ducatus. Tit. 55. de*
" *prohib. feud. alien.* Et *Galli* domanii, & Appannagiorum ex lege fun-
" damentali inalienabilium acerrimi assertores, Regibus suis non invident.
" His non obstantibus, in alteram partem non solum propendeo, sed pe-
" dibus eundum censeo; eamq; moribus nostris, juri feudali & civili ma-
" gis consentaneam; nec tot tantisq; incommodis laborantem, argumen-
" tis astruere, & contraria diluere conabor.

" Primo igitur, feuda recognita moribus nostris inter Propria seu Hæ-
" reditaria numeranda ex eo patet, quod Jure hæreditario & antiquo a
" prædecessoribus transmisso vindicata; quodque non per modum transmi-
" missionis, sed extinctionis & negationis ad Dominum devoluta sint:
" quamvis enim, ut in priori specie, feudum non expiraris, & per se ex-
" tinctum sit; quia tamen accedente Vasalli culpa, feudum vel ipso jure
" vel prævia sententia cessat; ideo merito dicitur extingui & irritari,
" ut Emphyteusis in se perpetua, ob delictum & Cessationem Emphy-
" teutæ biennalem annihilatur & extinguitur Jure Canonico & Civili;
" & Jure nostro scripto, constitutione 246. *Jacobi Sexti*; Ubi amissio
" & irritatio Emphyteuseos vel feudi ex Jure æquipollere dicuntur; irri-

" [illegible] eſt
" [illegible] quod
" [illegible] vel
" citet [illegible] eſſe,
" Dominus [illegible] quod
" Dominus [illegible] quod
" quum per [illegible] anti-
" exſerit; atque [illegible] eſſe,
" feudum redit ad Dominum, non [illegible] cum
" revertitur, ſed [illegible] ſi
" adeo ut non ſolum alienationes & [illegible]
" citra medietatem facta confirmant, recognitione ſubjecta ſortiant,
" ſed etiam ſubinfeudationes & [illegible] ab imo rege
" conſtitutæ, ex poſtfacto ſubvertantur, & recognitioni ſubjaceant: ſe-
" cus quam in *Gallia* ubi feuda Domino aperta omnibus a vaſallo impo-
" ſitis obnoxia ſunt, Teſte *Mathæo*.

" Atque hanc ſententiam juri feudali maxime eſſe conſentaneam,
" facile liquebit, perpenſa natura feudi. Feudum nonnulli definiunt do-
" minium utile; ſed meliores Juriſconſulti, explosa Dominii diſtinctione
" quæ non Juris ſed Magiſtrorum eſt, nullum utile Dominium admit-
" tunt; ſed Feudum uſumfructum & jus utendi fruendi eſſe volunt *Cu-*
" *jac. lib.* 1. de Feudis. *Duar. lib.* 2. *annotat. diſſ. Equinarius Baro,*
" *lib.* 4. de Beneficiis. *Joannes Borcholt. in diſſ. De Jure Emphyteutico.*
" Et textu feudali expreſſo nititur, qui definit Feudum Beneficii u-
" ſumfructum, *lib.* 2. *tit.* 1. *de feud.* & primo quidem precarium, vel
" annuum, vel ad ſummum, vitalem, *lib.* 1. *tit.* 1. poſtea uſu gliſcente
" perennem, *lib.* 3 *initio.* Sequitur igitur ex Jure feudali, feudum, ut om-
" nem uſumfructum, ſemel amiſſum & peremptum, non poſſe acquiri
" vel tranſmitti; ſed cum proprietate conſolidari; vel concinnius lo-
" quendo, dicendum uſumfructum clauſalem, quem dominus habet ex
" cauſa rei & jure Dominii. *L. Si cum argentum. §. penult. de excep-*
" *tionibus rei judicatæ*: & quaſi Dominii partem *L.* 4. *ff. de Uſufructu*
" & qui uſufructu formali (ut loquuntur Doctores) impediebatur quo
" minus ſe exſereret; eo repagulo per ſententiam declaratoriam & pri-
" vativam, ſecundum Dominum latam, ſubſtracto, emicare quaſi & e-
" mergere. *Secundo*, cum quis rem ob cauſam aliquam datam cauſa non
" ſecuta, recuperat condictione cauſa dati ex Jure Civili, connotat rem
" eo modo receptam cum omni cauſa & omnibus fructibus redire, quaſi
" nunquam data fuerit. *L. qui ſo debere. §. Fundus ff. de conductione cau-*
" *ſa data cauſa non ſecuta.* Et conſequenter, ſi quis feudum hæreditarium
" dotis nomine dederit, & nuptiis non ſecutis poſtea condixerit; poſt
" condictionem, hæreditarium eſſe nemo eſt qui diffiteatur. Pari ratio-
" ne, ſi feudum hæreditarium aliquis in feudum dederit, fidelitate quam
" ſtipulatus fuerat in perpetuam, vel nunquam ſecuta vel temerata; po-
" ſtea recuperarit condictione cauſa data quæ adverſus vaſallum infide-
" lem Jure feudali intentatur, *tit.* 20. *lib.* 1. *de feudis* non dicitur de no-
" vo acquiſiſſe, ſed cum priſtino jure & cauſa recuperaſſe; quod ſi in
" perſona primi concedentis feudum apertum non cenſetur conqueſtus,
" nulla eſt ratio diverſitatis in perſona hæredis, aut alicujus deſcenden-
" tis.

" *Tertio loco*, Deciſionem hanc a Jure Civili & ratione non alienam eſ-
" ſe, abunde demonſtrant trita illa Axiomata & Brocardica. *Nemini*

" [illegible]
" [illegible]
" [illegible]
" [illegible]
" [illegible]
" [illegible] quam [illegible]
" [illegible] quas [illegible]
" feudi non incepit decimas [illegible]
" ria hæc [illegible]; de [illegible]
" de rerum divisione; [illegible]
" [illegible]; Clientelis, de [illegible]
" feu Libellarium, cujus [illegible]
" tictus, omnium judicio [illegible]
" exemplum, & ideam [illegible]
" perpetuum elocato & conditionaliter [illegible]
" pro melioratione & canone [illegible]
" ciosæ alienationis, vel contumacis [illegible]
" Unde frequentissima ultro citroq; argumentatio [illegible]
" tuitur, ad alterum a Doctoribus [illegible]
" statuatur. Concludendum igitur, feuda [illegible]
" sicut Emphyteuses, de quibus nunquam [illegible]
" tibus; præsertim cum verba Juris omnia [illegible]
" lamq; transmissionem, aut ex parte Domini [illegible]
" *L. 2. C. de Jure Emphyt.*

" Atque his argumentis, feuda commissa feudi Principalis jure censeri evincitur iis, incommoda quæ contrariam sententiam gravant, quanenent, 1. quod posita subfeuda recognita conquestus esse, sequatur pendente fundi Dominantis usufructu, aperta usufructuario acquiri; ut omnes rei fructilis obventiones; idque non solum quoad usumfructum sed etiam quoad proprietatem, per *L. usufructu legat. §. 1. ff. de usufructu.* 2. indidem sequitur, feudo dominante sub pacto de retrovendendo seu reversione alienato, & postea ex lege pacti redempto, subfeuda medio tempore recognita fiant, reliqua commoda & fructus emptori non eripi; sed utcunque ampla & opima latifundia cum prætio refuso penes eum remanere, denique venditorem fundi dominantis, quamvis ipsum cum omnibus viribus & pertinentiis alienet, subfeudum ante alienationem commissum, Domino seu Emptore invito, posse recognoscere; nec Jus commissi, ut Revium, & alia ante venditionem cessa & venditori adquisita, ad Emptorem pertinere: Quæ consequentiæ quam cum ratione & praxi nostra congruant, judicandum relinquo.

" Hactenus sententiam, quæ tam in Jure quam praxi nostra potior videtur, utcunque probavimus; supersunt argumenta, quæ supra in contrarium proposuimus, quorum solutionem, licet ex prædictis facile eliciatur, paucis persequemur. Primum & secundum facile concidunt, sicut enim non refert, quomodo aut qua occasione usufructus finietur, sive per se, morte usufructuarii naturali vel civili, maxima & media capitis diminutionibus, an per accidens, cessione & proprietatis consolidatione, *Inst. de usufructu*: Sed quomodocunque finitus ad proprietatem revertitur: ita feudum, Jure Vasalli quomodocunque extincto, sive naturaliter ut in priori recognitionis specie; sive ex commisso; ad Dominum redit, & primævam suam naturam recuperat; nec

obstat

[illegible] commissionis, legali vel
[illegible] transmissionis
[illegible] transmissionis
[illegible] transmissionis
[illegible] commissionis
[illegible] commissionis, commissi potest eodo ac-
[illegible] quisito, [illegible] ad ipsos transmittendo, dubium non
[illegible] potest. [illegible] Limitatus ad [illegible] perpetui
[illegible] redeo [illegible] possessionem de [illegible] qui
[illegible] nec [illegible] *de rebus dotalibus*,
[illegible] *& Tab.* [illegible] manet in casu ex-
tinctionis & commissionis, qui necessario consolidationem, & in pri-
stinum statum sine onere redintegrationem implicat. Ad postremum
respondeo. Casu [illegible] consolidatio [illegible] demonstrata
sit; & [illegible] manifesta consolidata, ipsius na-
turam & qualitates, & [illegible] attendere, & doctorum qui
contrarium tenent, authoritatem, quia ratione non fulcitur, authenti-
cam non esse. Et hæc est juris civilis dispositio, juxta *L. inter soce-*
rum. ff. de [illegible] praxi, quæ plerumque a Jure recedit, &
hic & in *Gallia* adversatur; & Rex subfeuda etiam domanio annexo
subalternata, alienare potest; nec requiritur dissolutio. Ratio praxeos
hujus *extraordinariæ* hæc ostenditur, quod cum annexatio sit stricti juris, & o-
diosa, utpote quæ solutam, & ut leges ipsæ loquuntur, Legibus so-
lutam Principalis potestatis plenitudinem coarctat, nullam extensionem
patitur; ideoq; ea tantum quæ expresse annexa sunt, Domanii annexi
Jure censentur; non autem obventiones, & quantumvis hæreditariæ
accessiones. In *Gallia* certe luculenter *Caroli Novi* constitutio definit,
nil Domanio annexo comprehendi, nisi quod expresse & diserte con-
secratum, & coronæ incorporatum est, vel saltem per decem annos ab
iis qui a rationibus Regiis sunt Domanio annexo accensitum est: dispar
tamen ratio est in *Gallia*, & apud nos; ibi enim feuda a genuina feu-
dorum puritate discesserunt, & tantum non Alaudiorum & Patrimona-
lium Jure censentur, & proinde ad Dominum cum onere commissa re-
vertuntur. Apud nos vero tantum abest, ut stricta illa feudalitatis ty-
rannis, quæ rei suæ dispositionem annihilet, emolliatur, ut contra in-
tendatur; adeo ut Vasallus, Domino inconsulto, ne finium regundo-
rum experiri posset, nedum de feudo transigere; quod tamen Jure feu-
dali licet, *Tit. 22. lib. 4. de feudis*. Et feudum rescissum proditur,
ob deteriorationem & sylvarum stragem; cujus praxin refert doctiss.
Cragius inter *Davidem Boner* de *Rossye*, & *Joannem Crichton* de *En-*
nernythie. Concludo, Feuda subalterna ab antiqui seu hæreditarii feu-
di Domino recognita, hæreditati, non conquestibus accenseri, & feudo
dominanti consolidari.

S. The Sum of this *Latin* Exercise seems to be, That a *Feu* returning to the Superior by Recognition, is reckoned, in his Person, as *Heritage*, and not as Conquest: *Conquestus enim, proprie & vi vocis, est ex novo titulo oneroso: Et etiam, cum latius accipitur, est ex nova causa; quod, Recognitioni, quæ fundatur in jure Domini superioris, non convenit.*

S. The Heir of a Succeſſor [illegible]
ſelf, to the whole Deeds, that [illegible]
poſed; For, this Paſſive Title [illegible]
penal, but *Præceptio hæreditaria* [illegible]
hæredis, ut ille qui præ hæredi [illegible]
from a vitious Intrometter, who is made [illegible]
Penalty: And therefore the Heir of [illegible]
ther liable, *niſi in quantum ad eum pervenit.*

N. If a Defunct ſhould Reſign Lands formerly tailzied, and infeft his only Daughter in Fee; Will ſhe be liable as Succeſſor [illegible]
Vide Intrometter, Queſtiones 1 & 2. *in Line* 1.

S. If a Man ſhould Reſign Lands formerly tailzied, and infeft his only Daughter in Fee; What Doubt can there be but ſhe would be liable as Succeſſor *Titulo lucrativo*: Since upon the Breach of the Tailzie ſhe would be liable as Heir whatſomever?

N. If a Man ſhould infeft in Fee his apparent Heir of Tailzie, having a Daughter who ſucceedeth to him in his other Eſtate; Will the Heir-male be liable as *Succeſſor Titulo lucrativo?*

Quæritur. If an Heir-male being to ſucceed by a [illegible] getting a Right of a Part of the ſaid Lands, will be [illegible] *crativo? Ratio Dubitandi,* The Heir-male is not [illegible] only a Collateral; and there being an Heir of Line.

S. When a Man has a Daughter ſucceeding to him in his [illegible] eſtate, and infefts his apparent Heir of Taillie in his tailzied [illegible] be thought, That this Heir of Taillie, ſo infeft, ſhould [illegible] *ceſſor Titulo lucrativo, in ſuo ordine, quia præcipit;* and [illegible] cuſſing the Heir of Line. But on the other hand; Since there is an Heir of Line ſucceeding *in univerſum Jus*, to which the Heir of Taillie was not *ſtirpem ſucceſſurus*; he ſhould only be liable as a Gratuitous Succeſſor *in re donata*, and in ſo far as the Diſpoſition to him may be to the Defraud of Creditors. And thus, an Heir-male being to ſucceed by Virtue of a Taillie; but getting only by Diſpoſition before-hand a Part of the tailzied Lands, will not be liable as a Succeſſor *Titulo lucrativo*, where there is an Heir of Line.

N. If

[illegible]

[illegible] Successor to the Person [illegible] a Person forfeited [illegible] but his apparent [illegible]

N. A Tutor or Factor [illegible] the Office and Administration; and thereafter [illegible] the Rents of his Estate before he can be charged with [illegible] Intromitter, his Son will be liable *titulo successionis* [illegible] his Fees? ANSWER, It is thought he will be [illegible] clearing the accepting the Office and Obligement *ex præcedentibus*, is before the Fee.

§. THE Author says well, That tho' a Tutor or Factor have put his Son in the Fee of his Estate, before he be chargeable with any Malversation; yet his Son will be liable *titulo successionis*, for the Father's Aftermalversation; because the Obligement thereof flows from the accepting of the Office; which was anterior to the disponing of the Fee.

N. A Father having given his Daughter an Estate in Land (or otherwise) in Tocher to her Husband, and reserving his own Liferent, would she be thought to be Successor *titulo lucrativo*, if she be his Apparent Heir? *Ratio Dubitandi*, It is given to the Husband and not *titulo lucrativo*; in respect the Husband has Right by a Contract, and in Contemplation of *Onera Matrimonii*, and the Jointure he gives his Wife.

IF at least the Tocher in so far as it is *immodica*, may be questioned and retrenched in favours of Creditors?

§. THE *Daughter* in this Case, tho' also apparent Heir, will not be judged Successor *Titulo lucrativo*. For the *Marriage* is an *onerous Cause*, and the Tocher is the Husband's: And tho' this Tocher may be *immodica*; yet it cannot be questioned by the Father's Creditors, since 'tis disponed for an onerous Cause, both to the Daughter and her Husband; unless *designed* Fraud could be clearly qualified, with the Husband's Participation; which might be justly suspected, if, of a Man's hail Lands and Estate. For, albeit a Tocher appear by the Contract of Marriage to be given to the Husband; yet, *Ficta Juris*, it may be supposed to be first given to the Wife, and then to the Husband; and thus, quarrellable if *immodica*, as *inter conjunctas*.

Contract of
Merks upon a Right of
in Life-rent and
fairing, to
ceive Lands
his Heirs of the
Assignies: *Quæritur*, If
all precedent Debts
he was only a
former
represent his
said Contract, as
form to the Contract, he
the said Right be
be liable *pro ordine*,
difficult.

Quæritur, If the
age will be liable to
ing his Father is
the said Sum. And
if the said Sum
not liable to posterior Debts.
Decisio. So that their Father
And the Father was a Merchant,
and became Bankrupt. *Vide Heirs*,

5. Tho' this eldest Son of the
by Vertue of the Contract, would have been liable as Heir of Provi-
on, *in suo ordine*; yet, since he was not
rus, it may be justly doubted, if it should
suppose a Man should dispone to his Brother, Lands tailzied to him,
that is, to the Brother, as Substitute to the Heirs Male of One Marriage
which have failed, when the Disponer hath, at the same Time, a Son
of *Another* Marriage to succeed; yet this Disposition would not make
the Brother *passive* liable, because not *aliquis successor*, albeit appa-
rent Heir, as said is.

It is also thought, That this Son of the
liable for Debts contracted by the Father
him. For, tho' the Father was before obliged to make the Provision;
yet, that cannot have the same Force as if the Provision had not been
made, but he had succeeded in the Terms thereof; because, the Provi-
sion being made, the common Rule must hold to make him only liable
to anterior Debts. But, if the Provision had not been made, but he
had succeeded in the Terms of the Contract; then he had been Heir
of Provision, as said is. And the Author's insinuation, That *successores*
titulo lucrativo are not liable to posterior Debts, because the Right gran-
ted to him is *mera donatio*; doth not hold, either in Reason, or *de fa-*
cto: For, suppose a Man were obliged to infeft himself and the Heirs
of the first Marriage, and then should infeft the Son procreate of that
Marriage; yet this Son will be only liable, as Successor *titulo lucrativo*,
for anterior Debts, tho' this Disposition be not *mera donatio*. But still,
in all those Cases, *Fraud* in Prejudice of Creditors, is to be expelled.

N. If a Gentleman by his Son's Contract of Marriage dispone his Estate to him, Will he be liable to all the Debts, or only effeirand to the Value of the Right?

S. The Son will be held as *Successor Titulo lucrativo*, as to all prior Debts: For, he hath nothing to plead in this Case, save the Value of the Tocher received by the Father; which falls, ordinarily, much short of the Value of the Estate disponed.

N. An Uncle having disponed to his Nephew his Lands or others, being for the Time his apparent Heir; and having died without Children: *Quæritur*, Whether he be liable as *Successor Titulo lucrativo? Ratio Dubitandi*, He was only Presumptive Heir: And the Uncle might have had Children if he had married again. And upon the Reason foresaid, If the Lands had holden Ward, they would have Recognised.

S. Seeing the Nephew was for the Time, only Presumptive Heir, and not properly *alioquin successurus*; he will not be liable as *Successor Titulo lucrativo*. And, as the Author says, this Disposition, if the Lands held Ward, might have been a Ground of Recognition.

N. An Apparent Heir being infeft in Liferent in Lands to which he might have succeeded: *Quæritur*, Whether he will be *Successor Titulo lucrativo*, specially, if the Liferent be settled upon him, and the Fee upon his eldest Son?

S. This Case differs from *That* above, where a Liferent was only disponed to the apparent Heir. But since here the Liferent is disponed to the Son, and the Fee to *his* Son, the Disponer's Grandchild; it appears to be a *Præceptio hæreditatis*, both in the Father and Son, to make them liable as Successors *Titulo lucrativo*.

Singular Successors.

N. Quær. IF the Act of Parliament anent Registration of Sasines as to singular Successors, should only be understood such as have acquired Right from the common Author; and not Comprisers, and such as succeed upon account of Forfaulture?

S. 'Tis thought, That both Comprisers and Donatars would be judged singular Successors, in the Terms of the said Act; because, the Registration is thereby dispensed with as to the Heir only, in regard of his Representation: But as to all other singular Successors, Registration is made necessary.

The Subject of the Two next Titles; Sums Heritable and Moveable, *and*, Sums Moveable, *hath been already considered, Lit.* H.

Eldest Superior.

N. WHEN Lands are holden Ward of diverse Superiors, the eldest Superior and *antiquior*, is preferable as to Marriage. *Quæritur*, The foresaid Quality of *Antiquior*, Whether it is to be considered

[illegible] the Vassal; [illegible] of, [illegible] to be thought *antiquus*? [illegible] to the Vassal's Authors, should be thought *antiquus*?

'Tis thought, That the Superiority of [illegible] and his Predecessors *jure singulari*, did Feu-hold, is, in this Case, *antiquus*: But where the *King* is concerned as Superior, he is ever preferred; The *Feudum antiquius* certainly flowing from him.

N. Quid Juris, If a Person be infeft as Heir to his Mother or her Father to be holden Ward; and thereafter he infeft as Heir to his Father, the Lands also holding Ward; Whether of the Superiors will have Right to the Marriage?

S. When the Marriage of an apparent Heir vakes, as he is apparent both to Father and Mother, dying in respective Feus holding Ward; It would appear, That the Superior of the First Deceasant, whether Father or Mother, hath his *Jus quæsitum*. And there can be but One Marriage at a Time, of the same Person. But, *What if Father and Mother die together*, or, *before the apparent Heir come to the Age of Marriage?* Then 'tis thought, the eldest of the Two Superiors should be preferred.

N. A Person being infeft in Lands holding Ward; and thereafter being infeft upon a Comprising in Lands holding of the King: *Quæritur*, If the Marriage thro' his Decease will fall to the King, or the other Superior, during the Legal? *Ratio Dubitandi*, A Right by Comprising is only for Security, and Redeemable.

S. If the Comprifer decease during the *Legal*, the Marriage of his apparent Heir falls to the First Superior, and not to the King: And tho' the Comprising should thereafter expire; yet the other Superior having his *Jus quæsitum*, should not be prejudged, if so be the Marriage vake before the Expiration.

Superior Mediate.

N. The immediate Superior being found to have amitted his Superiority during Life, because being charged he did not enter: *Quæritur*, If the Mediate may infeft upon Resignation, being only Superior in that Part, and *in subsidium*, that the Vassal should not have Prejudice by his immediate Superior's Nonentry; but not *ad alios effectus*, which may prejudge the immediate Superior; and in special, That by obtruding to him a singular Successor to be his Vassal? The same Question may be in the Case of Ladies, Liferenters and Conjunct-fiars of Superiorities.

S. When the *immediate* Superior, not entering his Vassal when charged, amits his Superiority during Life; the *mediate* Superior may enter the Vassal *in subsidium*, that he may not be in Nonentry: Yet the immediate Superior should not be prejudged in other Respects. *But this Question we had above.*

T.

T.

Tack.

N. A TACK being ſet in *April*, of certain Lands and Houſes; whereof ſome were poſſeſt for the Time by the Tackſmen by a verbal Tack or Tolerance; others ſet to Tenents; and the Tack bearing the Entry to be after Separation from the Ground *in Anno* 1652. in which it was ſet: *Quæritur*, A Compriſer being publickly infeft before Separation; if the Tack will not militate againſt a Succeſſor, the Entry being *indebito tempore* after the Setter was denuded? ANSWER, It appears that the Entry, as to the Commencement of the Tack, was preſently the Time of the Date; ſeeing as to the Houſes and ſome of the Lands, the Tackſman was in natural Poſſeſſion: And as to the Graſs of the Lands ſet to a Tenent, the Entry, though not expreſt, was at *Whitſunday* following; and the Entry mentioned in the Tack ſeemeth to be meant of the Tackſman's Entry to Labour; *& Interpretatio facienda ut actus valeat.*

IF at leaſt the Tack ſhould be invalid as to the Lands which were ſet to Tenents, as being not publick by Poſſeſſion? ANSWER, It is thought, That a Tack being *Jus indiviſibile, poſſeſſio partis* maketh it publick *in Totum:* And it cannot be *ex parte* publick, and *ex parte, not.*

S. 'TIS thought, That the Compriſer or Adjudger would, *in this Caſe*, be preferred to the Tackſman: For, it is the *Entry* that gives the Tackſman Poſſeſſion; ſo that the Setter being denuded before, the Tack cannot hold: For any Poſſeſſion that the Tackſman had before the agreed Entry, cannot be aſcribed to the Tack: And the Entry agreed, being to the whole Lands; the Poſſeſſion that the Tackſman had *de facto* of any Part of them, before; is not to be regarded.

N. A Tack being ſet to a Tackſ-woman during Life, and after to her Heirs, until Payment of certain Sums, for *Ten Shillings* yearly; *Quæritur*, Will the Tack be void as without Iſh? ANSWER, It appears, that the Tack being ſet for Security of Payment of the Money, the Iſh is not altogether uncertain; *Certum eſt enim quod fieri poteſt certum, per relationem ad aliud*; and the Rent being *One Thouſand Pounds*, it may be conſidered in what Time that Rent may ſatisfy the Sum mentioned in the Tack: And upon the Matter, there is a Reverſion to the Setter and his Succeſſors, and they may determine the Iſh of the Tack by Payment.

S. THIS Tack, being without *Iſh*, will not militate againſt a ſingular Succeſſor: And tho' the Setter may determine the Tack by Payment of the Debt; yet the ſingular Succeſſor neither is, nor can be obliged to it.

N. NEITHER Servitudes nor Tacks do affect Lands in Prejudice of ſingular Succeſſors, unleſs they be real by Poſſeſſion: *Quæritur*, If ſuch Rights may be regiſtrate in the Regiſter of Reverſions, albeit the Act of

Parliament doth not mention the same? Answer, [illegible] if they will be real as Reversions?

S. Tho' such Rights should be registred in the Register of Reversions; yet, there being no *Warrant* for the Registration, it would not supply the Want of Possession. And 'tis by Possession only, that they become real against a singular Successor.

N. *Locatio & conductio* albeit they are not in Law *inter contractus qui re fiunt*, and by our Law they are not effectual unless they be *Re*, and cled with Possession; before which, they are personal as to the Contracters and their Heirs; but after that, they become real Rights, and bind singular Successors: *Quæritur* therefore, If a Tack of Lands be set to a Person to enter at *Whitsunday* thereafter; and thereafter another Tack be set to another Person before that Term, so that neither can have Possession; What Way the first Tacksman may perfect his Right, so that he may be preferred? Answer, It is thought, he may make Intimation of his Right to the present Tenent, and require him to remove at the Term, and protest for Remeed of Law.

S. *Locatio & Conductio consensu contrahuntur*, and so are effectual, but do not become *real* against a singular Successor, unless cled with Possession, in the Terms of the Act of Parliament: But if a Tack of Lands be first set to *One*, to enter at *Whitsunday*, and then to *Another*, to enter at the same Term, and *Neither* in Possession; 'tis thought, That the Tacksman first intimating, and making the Tack publick in any legal Way, should be preferred.

N. *Quæritur*, Why Tacks without Possession do not prejudge singular Successors; and yet Tacks do prejudge beneficed Persons? Answer, Beneficed Persons are not singular Successors; which properly are such as do acquire and purchase: Whereas Prelates and beneficed Persons are *Successores Titulo universali*; and are considered as singular Incorporations, whose Deeds do bind their Successors.

S. The Reason why Tacks without Possession do prejudge *beneficed Persons*, but not *singular Successors*, appears to be; That beneficed Persons are but Administrators; and the Kirk is, *as it were*, the Setter: But if the beneficed Person be not in the Title the Time of the Entry of the Tack, the Tack will be void.

N. When any Person is infeft in Teinds, *Quæritur*, If he may set Tacks longer than during his Right, in Prejudice of the Buyers or other singular Successors?

S. It doth not appear, why a Person infeft in Teinds may not set Tacks for what Space he pleases; and why these Tacks should not prejudge a singular Successor, if they be cled with Possession. But where the Heritor is allowed to buy his Teind, the Interest of both the Titular and Tacksman will be considered; and the Buyer get a clear Right.

N. A Tack being set to a Person for *Fifteen Years*, without Mention of his Heirs or Executors: *Quæritur*, Whether it be merely Personal? Or, at least the Heir (if the Tacksman decease before expiring of the Tack)

Tack [illegible] ANSWER. 'Tis thought, That [illegible] being no Mention of Heirs, the [illegible] only, That the Tacksman should [illegible] all the said Time, and not after. And in Tacks [illegible] Circumstances to be considered, if the Tenent be a substantious and vigorous Person; Whereas Heirs may be Infants, and not succeed in the Conditions foresaid.

S. A Tack set to a Man for Fifteen Years, without Mention of his Heirs and Executors, would not, now, be thought [illegible]; but would transmit to the Tacksman's Successors, for the remaining Space of the Tack, at his Decease.

Back-Tacks and Prorogation.

N. WHAT is the Reason, that in Wadsets, Back-tacks are valid, without a definite Ish; *viz.* During not Redemption?

Item, IN Prorogations, Tacks of Teinds to begin after the Ish of the former, tho' the Titular be denuded in the *interim*? ANSWER, In Wadsets, the Back-tack is *in corpore Juris*, and the Wadset is with the Burden thereof; the Wadset and Back-tack being correspective Rights: So that who succeeds in the Right of the Wadset, can have it no otherwise than *cum causa*. As to Prorogations, They are granted *in rem*, and by the Authority of the Judge.

S. BACK-TACKS in Wadsets, being only a Restriction of the Wadsetter's Possession, are valid, tho' they have no other Ish than during the not-Redemption: And thus they must affect the Successor in the Wadset-Right. And Prorogations of Tacks of Teinds to begin after the Ish of the Tack; and tho' the Titular may be denuded; yet are good; because granted by Authority of Parliament.

Tack of Teinds.

N. A Tack of Teinds being set to a Person and his Heirs and Assignies, for his Lifetime, and *Four Nineteen Years* after: *Quæritur*, If he be Year and Day at the Horn; Will the same fall under his Liferent-Escheat, only as to his Liferent, or entirely?

IF after his Decease it would fall under the Liferent, or, under the single Escheat of his Heir?

IF it be for many Nineteen Years, exceeding the longest Life of any Man; Will it fall notwithstanding, under a single Escheat, seeing there is not a formal Liferent constitute?

IF a Tack for many Nineteen Years should be assigned; Will the same fall under the single Escheat of the Assigny, seeing there is no Liferent as to him; and the Liferenters may all die in his Lifetime?

WILL not the Assigny have Right for the Lifetimes of the Heirs, tho' they be not served Heirs?

THE Tack being for three Lifetimes, and certain Nineteen Years after; *Quid Juris*, where the Tacksman has no Heirs, so that there is Place to a Gift of Bastardy, or *ultimus hæres*?

Tenents of

S. A Tack of Teinds, as in Relation to the Heir for his Lifetime, and Three Nineteen Years thereafter, will fall under the Tacksman's Liferent-Escheat, but only for the Tacksman's Lifetime, as appears plain by the Act of Parliament 1617. But if, after his Decease, it should fall under the *Liferent*, or under the *simple* Escheat of his Heir, may be a question, since the Tack, now, is no more a Liferent-Tack, but for a certain Space of Years, that may also pertinely run in the Heir's Life. But 'tis thought most probably, That it should fall under the Liferent-Escheat only; and so much the more, if the Tack be for many Nineteen Years, exceeding the longest Life of Man, tho' it be not a formal Liferent-Tack.

And thus, if this Tack for several Nineteen Years should be assigned, it would only fall under the Assigny's Liferent-Escheat: For, tho' these Cases be not decided; yet it seems incongruous, That a Liferent-Tack should only fall under the Tacksman's Liferent-Escheat; And, That a Tack for a certain Space of Years, probably exceeding a Lifetime, should fall under the simple Escheat; specially, when the Act of Parliament 1617 is expres, That the Liferent-Escheat should only prejudge the Rebel: Whereas a Tack for several Nineteen Years, if it should fall under the Tacksman or his Assigny their simple Escheat; might prejudge the Rebel's Heir.

An Assignation to a Tack for the Lifetimes of One, or Two, or more Heirs, will continue the Right, tho' the Tacksman have no Heir served.

A Tack being for Three *Lifetimes* and several *Nineteen Years* thereafter, and being assigned; If the Tacksman have no Heirs, neither in *esse* nor *posse*; the Nineteen Years must begin to run at the Tacksman's Death.

'Tis thought, The Act of Parliament in favours of Tenents having Tacks of Land cled with Possession, should also be extended to Tacks of Teinds.

Taillies.

N. WHEN a Person, having acquired Lands, provides the same to his Heirs Male; *Quæritur*, Whether the Maxim, *viz. Hæreditas descendit & Conquestus ascendit* has place in Taillies?

S. 'Tis thought, If he have no Sons, but Brethren, this Purchase would *ascend* as Conqueſt, and not *descend* as Heritage.

N. If a Tutor, intromitting with the Duties of Lands entailed to the Heirs Male, may not employ the same upon Security to the Pupil and his Heirs Male; upon Pretence that it should be presumed, that it was in the Parents Intention, as appears by the Entail? Answer, It is affirmed, That it was so decided in the Case of the Heirs of *Cockburnspath*, which we have not seen: But it is thought, That a Taillie being *Institutio Hæredis*; as a Tutor could not make a Testament for his Pupil, nor name an Heir and Executor for his Pupil, so he could not make a Taillie either in Land or Money.

S. A

Male; ought not to secure the Sums intrusted with the said Heirs Male? For, the Sums being moveable, the Tutor should not have fallen under the Disposition of Law; although, *the double fees* the Lords have inclined otherwise.

The next Case in Order, is that of the Duke of Monmouth's Forfeiture, in relation to the Taillie of Buccleugh: *Which is now out of Doors.*

N. Quæritur, If a Bond granted to a Man and his Wife, and longest Liver of them Two in Conjunct-Fee, and to one of their Sons expresly named, and the Heirs of his Body; which failzieing, to the Heirs to be procreate betwixt the Husband and his Wife; which failzieing, to the Wife, her Heirs and Assignies; be Heritable or Moveable, seing there is neither Infeftment thereupon, nor Obligement to infeft? ANSWER, 'Tis Heritable, in respect of the Taillie forasaid; there being no Taillie of Moveables or moveable Sums. And the Provision in Favours of Heirs, with the Substitution foresaid, is equivalent as if Executors were expresly excluded.

S. THIS Bond should fall and devolve according to the *Destination*; and consequently, to the Heirs of Provision, excluding other Executors; But still, seing it doth neither exclude Executors, nor hath an Obligement to infeft; it is moveable: So that the Fiar of the Bond may even Testate upon it. For, tho' a particular Destination excludes Executors; yet it should not make the Bond heritable, and so, intestable. But if the Right of this Bond should devolve to the Wife, her Heirs and Assignies; here, the Wife's *Heirs* should be understood to be her Heirs *in mobilibus*, and that is, *her Executors.*

THE Author is of Opinion, That the Destination by way of Taillie, makes the Bond heritable: And so it doth as to the excluding of Executors, and the Manner of Conveyance by way of Service: But there is no Reason why it should make the Bond heritable to hinder the Fiar to Testate upon it. And if there be no Taillie of moveable Sums, *as the Author inclines to think*; It would appear, That all Substitutions in moveable Bonds, should be only of the Nature of common Substitutions in the Civil Law; and so evanish, *si heres adierit.*

BUT because the Author often touches this Case, These Things may be noted:

First, THAT all Destinations should hold, and exclude other Executors or Successors.

Secondly, That tho' the Transmission may be by way of Service; yet it should not hinder the Fiar to Testate upon it, if the Bond be otherwise moveable; *That is,* neither bearing Infeftment, nor expresly excluding Executors. For, the great Rule; *That a Person may do no Deed on Death-bed, in Prejudice of his Heir,* doth at least regard such Things as are certainly, and in Law, heritable. But,

Thirdly, There appears a great Difference betwixt a Substitution that a Man provides for himself, and to regulate his Succession, *And* a Substitution that he makes to a Legatar, or to a Donatar: For, in the First Case, the Substitution should hold, unless the Fiar have vacate it by a direct Deed, But in the Second Case, so soon as the Legatar or Donatar succeeds, then the Substitution doth evanish, as the Civil Law appoints *in Substitutione vulgari.* And this seems to have given Ground for our old Pratique, whereby a Bond payable at a certain Time; *v. g.* to *Titius*, and

held: And so we now observe. And

Fourthly, Tho' in our Pratique, we do not distinguish as above distinguished; yet the Grounds of Law appear sound and good.

N. When a Person has settled his Estate upon a Friend, by a Disposition to him and certain Heirs of Taillie therein mentioned; and thereafter, for Security of the Taillie, has taken A Bond from the Person, in whose Favours the Taillie was made, that he should do no Deed to disinherit the other Heirs of Taillie, and to keep the Taillie inviolable: *Quæritur*, If the said Person shall, without any onerous Cause, dispone the Lands or grant Bonds for great Sums equivalent to the Value of the Estate; If the said Deeds may be questioned by the next Heir of Taillie? *Ratio Dubitandi*, The Doer of the said Deeds was Fiar; and the Heir of Taillie cannot come to the Estate, but as Heir to him, and is liable to his Deeds. Answer, It is thought, in the said Case, there is a *Fideicommissum* in Favours of the Heirs of Taillie: And though the Estate might be disponed for onerous Causes, the Disponer being Fiar; yet he ought not to have violate the said *Fideicommissum* by fraudulent and gratuitous Deeds. *2do*, Besides the said *Fideicommissum*, there is a supervenient Obligement, whereby the Heir of Taillie is Creditor; and therefore may question any Deed without an onerous Cause, in Defraud of the said Obligement: And an Heir, in whose Favours there is Obligements *qua* Heir, may question any Deeds done by the Person whom he represents, contrair to the said Obligement; as, *v. g.* When Deeds are done on Death-bed, or contrair to a Taillie bearing resolutive Clauses, though for onerous Causes; and much more in such a Case, where a Bond is granted to the End foresaid, which ought to be effectual, and could operate nothing if the Heir could not question the same.

S. If a Man should dispone his Estate by way of Taillie, and take a Bond from the Receiver of the Disposition; That he should do no Deed to frustrate the said Taillie, but should keep it inviolable: And if this Person should dispone the Estate gratuitously, or grant Bond to affect it; the Heirs of Taillie would have Action, upon the Bond given for observing the Taillie, to quarrel the foresaid Deed made by the Granter in their Defraud; they being indeed Creditors by the foresaid Bond. But since the Receiver of the Disposition was Fiar without any irritant Limitation; I should hardly think this Disposition to be a *Fidecommiss* and to have the Effect of a *Fidecommiss* in the Civil Law.

N. A Person having provided his Estate, failzieing Heirs of his own Body, in favours of a Relation, and the Heirs of his Body, &c. And having, by the Writ bearing the said Taillie, and a Procuratory of Resignation, provided, That he should be liable to satisfy all Bonds, Obligements and Deeds done, or to be done by him at any Time during Life: *Quæritur*, If these should be understood *civiliter*, during his *Liege poustie*, or, of his natural Life? Answer, That 'tis thought that it should be understood, during his natural Life; seeing the Entail being a free Gift, any Provisions therein-contained in favours of the Granter, ought to be

construed

[illegible] to be under [illegible]

[illegible] woman named in the [illegible] seeing it appears to be [illegible] Marriage? ANSWER. [illegible] is no Restraint as to his Liberty, seeing if he think fit, he may choose to accept the Right with that Quality, or not.

IF, the said Infeftment being made in *Leige Poustie*, and Resignation thereupon, the Granter may thereafter upon Death-bed, by a Paper apart, oblige his said Heir of Taillie to marry, as said is, or to fulfil any other Provision? ANSWER. 'Tis thought, That seeing he is not so stated in the Right of Succession, that the Granter cannot prejudge him, who has still *voluntas Ambulatoria*, and may evacuate the said Right, being Master of it, and having it in his own Hands and Power; as he may cancel it, so he may qualify it as he thinks fit: *Et qui potest plus, potest minus.*

S. WHEN a Man disponeth his Estate to a *Stranger*, with a Provision, That he should be liable to all Bonds and Deeds granted and done, or to be granted and done, at any Time during the Disponer's Life; 'Tis thought, these Words, *At any Time during the Disponer's Life*, should be understood, *during his natural Life*; the Taillie being a free Gift, and so, to be largely construed. But if a Man should grant the like Disposition to his Son and apparent Heir, and the Heirs of his Body, with the like Clause, of being liable to all Deeds during the Disponer's Life; It would only, in that Case, be understood of Deeds done in *Leige Poustie* and not on Death-bed. *See above in* Death-bed; *for our Author seems to vary.*

IF the Person in whose favours the Taillie is made, should be farther burdened, to marry a certain Woman by Name; he ought to fulfil it: For, as the Author says, This is no Restraint on his Liberty to marry, since he may choose to accept with the Quality, or not. And Restraints, are such as infer *Damnum*, not such as forbid *Lucrum*.

BUT if this Taillie were made in *Leige Poustie*; *viz.* in favours of the Granter and the Heirs of his Body; which failzieing, in favours of the said other Person, and the Heirs of his Body: And if Resignation be made upon it; the Author thinks the Granter might, even on Death-bed, burden this Heir of Taillie as he pleased. But then he supposes, That this Heir's Right of Possession is not so fixed, but that the Granter may make it void, by Vertue of the foresaid reserved Power, that keeps all in the Granter's Hand, and at his Disposal: For if it were not so, and that Infeftment had past on this Taillie; 'tis thought the Granter, even with Consent of his own Heir instituted, could not on Death-bed, burden his Heir of Taillie, in respect of his *Jus quæsitum* by the Infeftment, not alterable on Death-bed.

N. A Person having, by an Infeftment holden of the King, under the Great-Seal, taken the Right of his Lands to himself; which failzieing, to such a Person as he should name by Writ, and his Heirs; which failzieing, to certain other Heirs, did thereafter dispone his Estate, failzieing Heirs of his own Body, to the Person therein-mentioned, and the Heirs-male of his Body; which failzieing, to certain other Heirs of Tailzie; bearing a Procuratory of Resignation, and reserving the Resigner's Liferent, whereupon Infeftment followed: *Queritur*, If thereafter

they be infeft.

[illegible] years of [illegible] lowed [illegible] fied *Interim*, [illegible] cease, whether the [illegible] that the Perſon forefaid, in [illegible] ſerved Heir to the [illegible] and Firſt Infeftment, and the [illegible]

S. In the Firſt Caſe, 'tis thought the [illegible] themſelves cognoſced by a general Service, or a Concluſion of the Seſſion; and by another Concluſion in the ſame Summons, declare the ſaid Diſpoſition, and Infeftment upon it, to be declared void; that [illegible] may enter Heirs to the Diſponer. But the Perſon who was infeft as above, cannot regularly be decerned to denude in their Favours.

And in the other Caſe, it may be thought, That the Receiver of the *Second* Diſpoſition, may declare the Conſumption of his Right to have exiſted, and his Right to be revived and purified. *But ſuch perplexed Contrivances, are at beſt but ill adviſed.*

N. If the King grant a Charter, with the ordinary Clauſes irritant for preſerving of Families; and with that in ſpecial to be added, That it ſhould not be lawful to any that ſhould ſucceed to prejudge their Succeſſors *Delinquendo*, even by committing of Treaſon; and if they be guilty of ſuch Crimes, that the Eſtate ſhall be forfeit as to themſelves, but not as to other Succeſſors: Whether ſuch a Clauſe will ſecure againſt Forfaulture? *Ratio Dubitandi*, That it would be an Encouragement to Diſloyalty. 2*do*. It is againſt the common Law, & *pactis privatorum non derogatur Juri communi*. 3*tio*. By the late Act of Parliament anent Taillies, it is provided, That the King ſhould not be prejudged as to Fines nor Confiſcations, nor Superiors of their Caſualities. On the other Part, it is thought, There ſhould be a Difference betwixt theſe, who by their Vertue and Purchaſe have founded a Family; and theſe who ſucceeded in the Right of Eſtates acquired by Loyal and Virtuous Perſons. In the firſt Caſe, it is juſt that the Perſon who has purchaſed and entailed his Eſtate with ſuch Clauſes, if he commit Treaſon, ſhould forefault for himſelf and all his Succeſſors: In the other Caſe, it is hard, that a Perſon deſcended of an ancient and loyal Family ſhould forefault an Eſtate not acquired by himſelf, in Prejudice of the Family; and that the perſonal Delinquence of one ſhould weigh down the Merits of many Predeceſſors: A Family being like a Ship, out of which the *Jonas* that has raiſed the Storm ſhould be caſt, and not the Ship and whole Family periſh. And, upon the Conſideration foreſaid, it has been provided, for the ſtanding of Families, even by Divine Law, That it ſhould not be in the Power of one to ruine the Family; but the Succeſſor's Right ſhould revive by the *Jubile*: And by the Feudal Law, in the Beginning, *Feuda* were not *Hereditaria*, ſo as that the Heirs and Succeſſors ſhould be forefaulted by the Deed of their Predeceſſors: And when *Feuda* came to be *Hereditaria*, there were ſome that were *ex pacto & providentia*; ſo that the Succeſſion was ſettled in ſuch a Manner, that it could not be cut off by the Deed or Forefaulture of any of the Deſcendents, but as to their own Intereſt: And there are yet Entails elſewhere, and in *England* of the like

Nature

Negative [illegible] the Occasion; [illegible] preserved; it being thought [illegible] during his Life, than [illegible] Brother. And as to that [illegible] encouraged; It is of no Moment as to all other Interests [illegible] there is no Provision to [illegible] to all Intents; yet *proviſio hominum* [illegible] is no Law nor Statute, with us [illegible] with such Provisions, as are conſiſtent [illegible] Law, and even the Civil Law (*Nov.* [illegible]) and the Laws of other Nations, and [illegible] other Kingdoms: And the Reaſon, *pactis privatorum, &c.* doth militate moſt, when the certain Form and *modus habilis* is preſcribed by Law for Conveyances or Teſtaments, which ought to be preciſely kept and obſerved without Derogation. In other Caſes, *Proviſio hominis*, as ſaith the [illegible] As, by our Law, a Relict has a Terce of Lands, and a Third of Moveables; and Marriage being diſſolved within Year and Day, the Tocher ought to return: And in caſe Ward-Lands, or the major Part be diſponed, they are recognifed: And, if a Feu-duty be not paid for the Space of Two Years, the Feu may be reduced; and yet as to theſe and many other Caſes, *derogatur Juri communi pactis privatorum.* And as to the Act of Parliament concerning Taillies, it doth militate only in the Caſe of Taillies with the ordinary Clauſes irritant, anent the contracting of Debts, or doing other Deeds; ſo that albeit by the ſaid Clauſes irritant, the Debts or Deeds of the Contravener are void, as to taillied Eſtates, yet Confiſcations and Fines in Favours of the King do affect the Eſtate: And it is not provided, by the ſaid Act of Parliament, that it ſhould not be lawful for the King, upon the Conſiderations foreſaid, to grant a Right entailed with the ſaid Clauſe, That the Eſtate ſhould not be forfault in Prejudice of the Entail: And it cannot be ſaid, that the Conceſſion of a Prince qualifying his own Grant with ſuch Proviſions as he thinks fit, is *Pactum privatorum*: And ſeeing other Superiors may ſo qualify the Infeftments and Rights granted by them to their Vaſſals, that the Vaſſal ſhould not forfault his Lands, for feudal Crimes; for ſelling the Lands holden Ward, without the Superior's Conſent; or for being behind in Payment of Feu-duties: It is againſt Law and Reaſon to deny that Power to the King, to qualify the Vaſſal's Right; ſo that, when Lands otherwiſe would forfault, they ſhould not forfault in Prejudice of the Family and Succeſſors.

5. The Act of Parliament 1690, does now regulate the Effect of Forfeitures as to *Heirs of Entails*. But, before that Act, albeit much might have been ſaid in Behalf of the King's Charter, diſpenſing with the Rigour of Forfeitures, and ſecuring the Heirs of Entail from the Effect of it, by the foreſaid Clauſe, *Declaring, That it ſhould not be lawful to thoſe who ſhould ſucceed, to prejudge their Succeſſors by any Crime, even that of Treaſon: And, that the Perſon committing, ſhould forfeit for himſelf only; but not as to his Heirs*: yet, unleſs the foreſaid Act had interveened, the Laws of the Kingdom, appointing Forfeiture to be the Pain of Treaſon, would have prevailed againſt any ſuch previous Diſpenſation and Limitation accorded by the King, before the committing of the Crime; and *that* on Account of the *Intereſſe Republicæ*, for reſtraining ſuch a grievous Crime. But, as hath been ſaid before, *Death* ſhould

§. In the First Case, it is thought the Conquirers of themselves cognosced by a Special Service, or a Confirmation of the Superior; and by another Conclusion in the same Statement, declare the foresaid Disposition and Infeftment upon it, to be declared void; that the Superior may enter Heirs to the Disponer. But the Person who was infeft as above, cannot regularly be decerned to denude in their Favours.

And in the other Case, it may be thought, That the Receiver of the *Second* Disposition, may declare the Condition of his Right to have existed, and this Right to be revived and purified. *But such perplexed Contrivances, are at best but ill advised.*

N. If the King grant a Charter, with the ordinary Clauses irritant for preserving of Families; and with that in special to be added, That it should not be lawful to any that should succeed to prejudge their Successors *Delinquendo*, even by committing of Treason; and if they be guilty of such Crimes, that the Estate shall be forfeit as to themselves, but not as to other Successors: Whether such a Clause will secure against Forfaulture? *Ratio Dubitandi*, That it would be an Encouragement to Disloyalty. 2*do*. It is against the common Law, & *pactis privatorum non derogatur Juri communi*. 3*tio*. By the late Act of Parliament anent Taillies, it is provided, That the King should not be prejudged as to Fines nor Confiscations, nor Superiors of their Casualities. On the other Part, it is thought, There should be a Difference betwixt these, who by their Vertue and Purchase have founded a Family; and these who succeeded in the Right of Estates acquired by Loyal and Virtuous Persons. In the first Case, it is just that the Person who has purchased and entailed his Estate with such Clauses, if he commit Treason, should forefault for himself and all his Successors: In the other Case, it is hard, that a Person descended of an ancient and loyal Family should forefault an Estate not acquired by himself, in Prejudice of the Family; and that the personal Delinquence of one should weigh down the Merits of many Predecessors: A Family being like a Ship, out of which the *Jonas* that has raised the Storm should be cast, and not the Ship and whole Family perish. And, upon the Consideration foresaid, it has been provided, for the standing of Families, even by Divine Law, That it should not be in the Power of one to ruine the Family; but the Successor's Right should revive by the *Jubile*: And by the Feudal Law, in the Beginning, *Feuda* were not *Hereditaria*, so as that the Heirs and Successors should be forefaulted by the Deed of their Predecessors: And when *Feuda* came to be *Hereditaria*, there were some that were *ex pacto & providentia*; so that the Succession was settled in such a Manner, that it could not be cut off by the Deed or Forefaulture of any of the Descendents, but as to their own Interest: And there are yet Entails elsewhere, and in *England* of the like

Nature

Nature [illegible] the Occasion; [illegible] thought [illegible] than by [illegible] as to that [illegible] is of no [illegible] all other Interests. And [illegible] there is no Provision to [illegible] all Intents; yet *proviſio hominem* [illegible] Law nor Statute, with [illegible] as are conſiſtent [illegible] Civil Law (*Inſtit.* [illegible]) and the Laws of other Nations, and [illegible] Kingdoms: And the Proverb, *pacta privatorum, &c.* doth militate [illegible] certain Form and *modus habilis* is preſcribed by Law for [illegible] or Teſtaments, which ought to be preciſely kept and obſerved without Derogation. In other Caſes, *Proviſio hominem, ut ſaith the ſolite ſaying*: As, by our Law, a Relict has a Terce of Lands, and a Third of Moveables; and Marriage being diſſolved within Year and Day, the Tocher ought to return: And in caſe Ward-Lands, or the major Part be diſponed, they are recognifed: And, if a Feu-duty be not paid for the Space of Two Years, the Feu may be reduced; and yet as to theſe and many other Caſes, *derogatur Juri communi pactis privatorum.* And as to the Act of Parliament concerning Taillies, it doth militate only in the Caſe of Taillies with the ordinary Clauſes irritant, anent the contracting of Debts, or doing other Deeds; ſo that albeit by the ſaid Clauſes irritant, the Debts or Deeds of the Contravener are void, as to taillied Eſtates, yet Confiſcations and Fines in Favours of the King do affect the Eſtate: And it is not provided, by the ſaid Act of Parliament, that it ſhould not be lawful for the King, upon the Conſiderations foreſaid, to grant a Right entailed with the ſaid Clauſe, That the Eſtate ſhould not be forfault in Prejudice of the Entail: And it cannot be ſaid, that the Conceſſion of a Prince qualifying his own Grant with ſuch Proviſions as he thinks fit, is *Pactum privatorum*. And ſeeing other Superiors may ſo qualify the Infeftments and Rights granted by them to their Vaſſals, that the Vaſſal ſhould not forfault his Lands for feudal Crimes; for ſelling the Lands holden Ward, without the Superior's Conſent; or for being behind in Payment of Feu-duties: It is againſt Law and Reaſon to deny that Power to the King, to qualify the Vaſſal's Right; ſo that, when Lands otherwiſe would forfault, they ſhould not forfault in Prejudice of the Family and Succeſſors.

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is a greater Severity [illegible]

N. The Lands of [illegible] tor thereof, [illegible] failzieing to [illegible] failzieing, to his [illegible] having [illegible] That it should not be [illegible] ower of [illegible] men, with Claufes [illegible] dutive [illegible] of the Terms of [illegible] declared [illegible] the Eſtate, and devolv[illegible] upon the [illegible] All which Claufes are [illegible] Bond of [illegible] of Saſine following thereupon.

Anna Keith, being the only Heir of the [illegible] of the Lands; ſhe, by Contract of Marria[illegible] Affairs, is obliged to reſign, and provide the fai[illegible] to him and her in Conjunct-fee and Liferent, and to [illegible] to be procreate betwixt them; which failzieing, to the [illegible] of her Body; which failzieing, to the eldeſt Heir Female to be procreate betwixt them; which failzieing, to the eldeſt Heir Female of her Body; which failzieing, to him and the Heirs-male of his Body; which failzieing, to the eldeſt Heir Female of his Body; which failzieing, to him, and his Heirs and Aſſignies whatſomever.

1. *Quæritur*, Who is Fiar by the Conception of the Taillie; Whether the Wife; becauſe, ſhe having been formerly Fiar, the Taillie was made upon her Reſignation; and ſo the Heirs of the Marriage muſt *ſine Dubio* be Heirs to her? Or, Whether the Husband, by the Prerogative of the Sex, and by the laſt Termination of the Taillie, which reſolves on his Heirs (*ut ſupra*) will be Fiar? Or, If the foreſaid Deſtination, whereby the Wife's Heirs-male or Female are preferred to the Husband's, in all the Branches of the Subſtitutions, will alter the Caſe?

2. To whom the Heir of the Marriage could be ſerved; Whether to the Husband, or to the Wife?

3. *Hoc ſuppoſito*, That the Husband be Fiar; Whether or not the foreſaid Contract, whereby ſhe puts the Husband and Heirs of the Marriage in Fee, will be interpret, in Law, prejudicial to the former Taillie, as a wronging thereof; altho' the Husband was expreſly obliged to aſſume the Name and Arms of the Family; which completes the Deſign of all ſuch Taillies? And, Whether the Contract, being in Minority, will be reducible upon that Ground?

4. Altho' it might be reducible, as debording from the Firſt Taillie, by making him and his Heirs abſolute Fiar; yet; If it may not ſtand, in ſo far as concerns the Husband and the Heirs of his Body; and be only reducible, in ſo far as it alters, and debords from the other Branches of the Taillie?

S. 'Tis thought, That, by the Conception of the ſaid Reſignation in the Contract, the Wife is Fiar, in reſpect of the Firſt Termination after the Conjunct-fee, and their Heirs-male; upon the Heirs-male of her Body: And therefore, the Heir of the Marriage muſt be ſerved to the Wife, and not to the Husband. And the Husband is not Fiar, otherwiſe it had been a Breach of the Taillie; And if made in Minority, it had been reducible. And in ſtrict Law, the Controvention is a Forfaulture.

Taillie.

BUT 'tis thought, [illegible] *cluſis*, it varies the Ca[illegible] are included.

THO' the *Brieve* [illegible] *annuis Reddibus* [illegible] yet his Heir may [illegible] ſame Brieve: For [illegible] ouſly underſtood.

WHEN Teinds are [illegible], the Superior, ſhould only have the Feu-duty, if they hold Feu; or, [illegible] of the retoured Duty of the Property: For, this ſeems to be the moſt equal Rule.

Teind of Fiſh.

N. BOATS for taking of Fiſh, lying upon the Shoar in One Paroch, and going thence and returning thither for taking and unloading; but belonging to Perſons in another neighbouring Paroch: *Quæritur*, If the Teind of the Fiſh ſhould belong to the Miniſter of the Paroch where they are taken, or, where the Owners and Fiſhers dwell?

S. 'TIS thought, the Teind of the *Fiſh* would belong to the Miniſter of the Paroch where they are taken and unloaded, without reſpect to the Owner's and Fiſher's dwelling elſewhere: For, this ſeems to be the Import of the Miniſter's Title.

Proving the Tenor.

N. IF a Compriſing may be made up by proving the Tenor? ANSWER, It is thought, not? In Reſpect, by the Act of Parliament, the Tenor of Letters of Horning and Executions cannot be proven; and there is *Eadem Ratio* as to Compriſings: And a Compriſing is not of the Nature of *Scripta & Inſtrumenta quæ poſſunt reſici*, being both of the Nature of Executions, and of a Decreet of the Meſſenger as Sheriff in that Part: And neither Executions of Meſſengers, nor Decreets can be made up by proving the Tenor: And it is not enough, that Witneſſes may remember, and be poſitive that there was a Compriſing; ſeeing they cannot remember, at leaſt ought not to be truſted, whether the Compriſing be formal; which being *Juris*, they can neither be Judges nor Witneſſes thereto.

S. The *Tenor* of a *Compriſing* cannot indeed be proven nor made up, becauſe of the Executions and Solemnities thereof, and the *Quæſtiones Juris* that may ariſe thereon, which cannot be truſted to Wineſſes: For which Cauſe alſo, the Act of Parliament forbids the proving of the Tenor of Letters of Horning and their Executions.

N. Quæritur, IF a Decreet for proving the Tenor can ſatisfy the Production in an Improbation? ANSWER, It is thought, it ſhould not; no more than a Tranſumpt: Seing otherwiſe, the indirect Manner may be cut off, which ariſeth upon the comparing of Hand-writ, and other Circumſtances from the Principal; which is not competent, when Extracts only of ſuch Writs are produced. And the Stile, That ſuch Decreets

ſhould

should [illegible] produced, is to be understood [illegible]

S. In a Decreet proving the Tenor, satisfy the Production in an Improbation? [illegible] not a complete Remedy for Writs loſt. [illegible] often raiſed to prevent Certification [illegible]. And therefore, tho' the *Tenor* cannot supply the Principal [illegible] as to the comparing of *Hand-writs* and other Circumſtances; yet if a Tenor were found proven by a Decreet *in Foro*, it would be ſuſtained.

N. If, Sentences or Acts of Court being loſt, the Tenor may be proven? If, Executions of Summons of Interruption being loſt, may be made up by proving the Tenor, after the Deceaſe of the Meſſenger? *'Tis thought*, That they cannot; Seing by the Act of Parliament, the Tenor of Letters of Horning and Executions cannot be proven. And there is *eadem Ratio* as to other Executions made by Meſſengers; which appears to be that; *viz.* That they are *Servi publici*; and by the Law, only truſted and authoriſed as to ſuch Acts, and their Relation of the ſame.

S. 'Tis thought, That Sentences or Acts of Court being loſt, the Tenor ſhould not be proven, becauſe of their Solemnities. And thus, Executions of Summons of Interruption; and in effect, no Executions of *Letters*, ſhould be admitted to be proven, becauſe of the Strictneſs of their Solemnities, and the Queſtions that may ariſe thereon *in jure, as hath been ſaid.*

N. If the Tenor of Bonds may be proven? Answer, There is a Difference betwixt Bonds and other Writs, in reſpect Bonds are granted to the Effect they may be ſatisfied, and retired upon Satisfaction: And Debitors think themſelves ſecure, when they retire and deſtroy their Bonds. And therefore, when a Bond cannot be produced; *Inſtrumentum penes Debitorem*, or which cannot be ſhown, *præſumitur liberatum*; unleſs there be a clear Evidence that they could not be ſatisfied; as that the Term of Payment was not come, or ſuch like; and *caſus amiſſionis* be poſitively libelled and proven; as, *Incendii, Ruinæ*, or the like.

S. In the Probation of the Tenor of Bonds, the *caſus amiſſionis* ſhould be very ſtrictly examined, and clearly proven, and other Circumſtances alſo conſidered; becauſe, as the Author ſays, Bonds may be retired: And a retired Bond liberates from the Debt.

N. If a Compriſing may be made up by proving the Tenor? Answer, 'Tis thought, Not, for the Reaſons foreſaid; *viz.* That 'tis both an Execution and Sentence; and the Tenor is ſo long when it is of ſo many Baronies, and it contains ſo many Eſſential Formalities and Acts of Execution; and the Witneſſes to many ſeveral Executions, that no Perſon can declare that the Tenor libelled is exactly the true Tenor: And Compriſings are of that Nature, that they may be ſatisfied; and are deduced to the end they may be ſatisfied.

S. That the Tenor of Compriſings ſhould not be proven, is ſaid above, *Q.* 1. *B. t.* And here again, the Author gives very good Reaſons for that Opinion.

Decreets

N. THE Tenor of a W[illegible] fy the [illegible] presentatives being [illegible] ing? *Ratio Dubitandi*, [illegible] queſtion the Writ, [illegible] Decreet for proving [illegible] Bond; there is *eadem Ratio* [illegible] batſon in the indirect Writ is [illegible] *hujus Literæ.*

S. THIS Queſtion was conſidered under the [illegible] Title.

Terce.

N. A Perſon having diſponed Lands *bona fide*, but being prevented by Death, before the Buyer was infeft; *Quæritur*, Whether the Relict will have Right to a Terce? *Ratio Dubitandi*, The Relict has a Terce of all Lands wherein her Husband died infeft, [illegible] perſonal Creditors. On the other part, it is conſidered, That, the Husband having *bona fide* diſponed, and the Deed being liable for implement, the Relict ſhould be in better Caſe than the Heir, who has no Part; and that the Relict ſhould have only Right to a Terce of Lands undiſponed; and that there is a Difference betwixt a Diſpoſition and other perſonal Debts; ſeing a Diſpoſition is *Jus ad rem*, which cannot be ſaid of other Obligements. And theſe Words, *That ſhe ſhould have Terce of all wherein the Husband died infeft*, ought to be underſtood *civiliter*; *viz.* undiſponed.

Quæritur, (If Lands be Redeemable) Whether the Relict Tercer have any Part of the Money whereupon the Lands are redeemed; ſpecially, when the Husband died infeft upon a Comprising? *Ratio Dubitandi*, The Law gives unto Relicts only a Terce of Lands, and not Sums of Money. And there is a Difference betwixt a Tercer and a Liferenter who is provided to a Liferent of Lands under Wadſet.

A Perſon being obliged for a moſt onerous Cauſe, to diſpone his Lands, and deceaſing before Infeftment or Reſignation; *Quæritur*, If his Relict will have a Terce, notwithſtanding of the Diſpoſition? *Ratio Dubitandi*, That 'tis hard the Relict ſhould be in better Caſe than the Fiar and Heir, from whom the Lands may be evicted by a Party for implement. And tho' the Husband died infeft, his Right was *rejicibile*, and ſuch as might have been evicted from him. *Ad.* A Reverſion is but *Jus ad retrovendendo*: And in this Caſe there is a full Verſion, and yet an Order may be uſed upon a Reverſion, which will either prevent the Terce, or extinguiſh it.

Quæritur, If a Reverſion, tho' not regiſtrate, will militate againſt the Relict, to prevent her Terce, or to redeem? *Ratio Dubitandi*, She is not to be conſidered as a ſingular Succeſſor, but, as having a Right by Virtue of, and, as depending upon her Husband's Right, yet ſtanding in his Perſon: whereas he is denuded in favours of a ſingular Succeſſor.

'TIS *indubii Juris*, That the Husband's Debts that are only perſonal, do not prejudge a Relict of her Terce. But, *Quæritur*, Whether a Compriſer

priſing before her Husband's Deceaſe will militate againſt her? And if, as to this Point, there be a Difference betwixt a Compriſing whereupon the Superior is charged, and whereupon there is no Charge?

Quæritur, If a Diſpoſition whereupon there is Reſignation, will prejudge a Terce?

Lands being wadſet for a certain Sum: *Quæritur*, If the Relict of the Creditor will have a Terce both of the Lands, and in caſe of Redemption, of the Sum of Money?

If a Wadſet be to a Husband only; and after his Deceaſe, to his Wife; and an Order be uſed and declared: *Quæritur*, If ſhe will get a Terce of the Money? And in that Caſe, Whether the Executors will not only have Right to the Two Parts, but to the Third Part of the Sums conſigned, with the Burden of the Relict's Liferent?

A Lady, by her Contract of Marriage being provided to a Liferent; and infeft baſe in Satisfaction of her Terce, and what elſe ſhe may pretend: *Quæritur*, If, the Superior queſtioning her Right as baſe, ſhe may have Recourſe to a Terce, as renounced in Behalf of the Husband, and not of the Superior? And the Renunciation being *cauſa data intuitu* of her Liferent, he cannot debar her from the ſame, and take any Advantage by the ſaid Renunciation.

Quid Juris as to a Tercer, being Liferenter of a Third Part? Answer, The Difference betwixt the Liferent and Terce is, That the Liferenter's Right is anterior, and certain; but the Terce is poſterior, and uncertain. So that the Fiar may ſell the Lands: In which Caſe, there would be no Terce. *Vide Liferenter, quæſt. ult.*

5. When a Perſon, having diſponed Lands *bona fide*, is prevented by Death, before the Buyer is infeft; his Relict, 'tis thought, will have Right to her Terce: For, tho' the Husband actually diſponed, and that Infeftment failed to follow, through no Fault; yet the Law gives the Relict the Terce of whatever Lands the Husband died infeft in, without reſpect to his Diſpoſition, as well as to his Debts.

And if the Husband had a redeemable Right, the Relict and Tercer will have her Share of the Money, upon Redemption: For here, the the Money comes *en lieu* of her Terce. *And farther*, Suppoſe Lands were compriſed from the Husband, for his Debt; yet if the Compriſer be not infeft, the Relict will get her Terce.

But the Author ſtill thinks it hard, if the Husband ſell and reſign, tho' no Infeftment, That there ſhould be a Terce, and the Relict be thereby in better Caſe than the Fiar and Heir. But ſince it is her legal Proviſion; Why ſhould ſhe be prejudged? And even as to *Wadſets*, the Relict will have her Terce. But, *What if an Order was uſed for Redeeming, before the Wadſetter's Death?* And 'tis ſtill thought, That unleſs the Wadſet were *Renounced* or *Declared*, ſhe muſt have her Terce, either of the Lands or of the Money.

'Tis likewiſe thought, That a Reverſion not regiſtred ſhould not militate againſt a Tercer, more than againſt another ſingular Succeſſor: For ſtill ſhe hath the Proviſion from the Law, and not from the Husband.

The Author ſays well, That the Husband's perſonal Debt cannot prejudge a Terce: Nor ſhould a bare Compriſing for them, as hath been ſaid. But if the Compriſer has charged the Superior before the Husband's Death; This Charge ſeems, by the Act of Parliament 1661, equiparate to an Infeftment; and ſo would bar the Terce.

[illegible]

A Wadset being to a [illegible]
Order were uſed in the [illegible] an
the Lands and Money; unleſs [illegible] to
by, or declared againſt her in [illegible] ced
pear, how ſhe ſhould have [illegible] apr
unleſs the Wadſet had been [illegible] Money,
Time, as ſaid is: For then, the [illegible] Husband's
and falls under the Wadſetter's Diſcretion, [illegible] her Relict's
Part.

A Woman being inſeft *baſe* upon her Contract of Marriage, in certain Lands in Satisfaction of her Terce; if the Superior ſhould quarrel her Right, in all Reaſon ſhe ſhould recur to her Terce, if there be a Recourſe to it. But put the Caſe, ſhe is inſeft baſe in Wadſet-lands, and that the Husband thereafter alienates the greater Part, and makes the Whole recognoſce; her Liferent muſt fall; and ſhe will have no Recourſe, becauſe her Husband alſo diveſted.

The Difference betwixt a *Liferent* and a *Terce* is none upon the Matter; but ordinarily, the Liferent is anterior and certain by Proviſion; but the Terce, poſterior and uncertain, and by Diſpoſition of the Law.

The next Title, is only a Latin *Definition of* Territorium; *viz.* Univerſitas agrorum, juriſdictione munita.

Teſtament.

N. IF a Teſtament may be Holograph?

S. There appears no Reaſon why a Teſtament may not be Holograph; nor can there, in this Caſe, ariſe any Queſtion about the Date, which is only underſtood to be before the Teſtator's Death.

N. If a moveable Debt be due to an *Engliſh*-man who is deceaſt, Muſt it be confirmed in *Scotland*; *& è Contra?*

If a Nuncupative Teſtament in *England*, will have Right to a Debt due in *Scotland*? *Ratio Dubitandi*, It is valid in *England*: *& mobilia non habent ſitum, & ſequuntur perſonam*: On the other Part, *corpora mobilia & nomina*, though they have not *ſitum*, as Lands; yet they have it ſo far, as being *res Scotiæ*, they cannot be tranſmitted, but according to the Law of *Scotland*; Law being *rerum Domina*.

S. We had this Queſtion before, Tit. *Nomina Debitorum*, and Tit. *Strangers*. Where it is fully diſcourſed, That *Mobilia ſequuntur perſonam*, and ſhould be diſpoſable according to the Law of the Man's Reſidence; and likewiſe, that his perſonal Deeds ſhould be regulate by the Solemnities there in Uſe: But a nuncupative Teſtament, depending on the Evidence of Witneſſes, which in *Scotland* is limited, and the Limitation a Rule of Judgment; may be the Reaſon why ſuch a Teſtament would not be ſuſtained with us.

N. Quid Juris, If it be offered to be proven by the Oath of the neareſt of Kin, that the Defunct did, before him, and other Witneſſes

above

above Executors, name the Purſuer his Executor and univerſal Legatar; Will a nuncupative Teſtament ſo proven, be ſuſtained? ANSWER, It is thought, it will not; ſeeing nuncupative Teſtaments are not in our Law admitted: And it is *de forma*, that they ſhould be *in Scriptis*.

Quæritur, If a Teſtament may be ſuſtained by Way of Inſtrument? ANSWER, An Inſtrument under a Notar's Hand, being but the Aſſertion of a Notar, is not conſidered as *Scriptum*, which requires the Subſcription of the Party himſelf; or *in ſubſidium* by Notars, before Witneſſes *de ejus mandato*.

Quæritur, If one Notar ſubſcribing for the Teſtator, be ſufficient in Teſtaments? ANSWER, *Affirmative*; in reſpect of the great Favour of laſt Wills; and oftentimes there is not *copia Notariorum*.

S. THE Author ſays well, That tho' it ſhould be offered to be proven by the Oath of the neareſt of Kin, that the Defunct did, before him and other Witneſſes, name the Purſuer his Executor and univerſal Legatar; it would not be ſuſtained: For, Writ is neceſſary to a Teſtament. *And*, That a Teſtament cannot be made up by the *Inſtrument* of a Notar; for that is not the *Writ* neceſſary, and wants the Subſcription of the Party, which ought only to be by the Party himſelf, or by Notars for him, and *de ejus mandato*. *And*, That one Notar, ſubſcribing a Teſtament for the Teſtator, is ſufficient; albeit the Teſtament may be of Importance, and that Writs of Importance ſhould, by the Act of Parliament *Ja.* VI. Parl. 6. Cap. 80. be ſubſcribed by Two famous Notars and Four famous Witneſſes, if the Maker cannot write. But this is in favours of Teſtaments.

N. MINISTERS, by Act of Parliament cannot be Notars; but in the Caſe of Teſtaments; *Quæritur*, If *eo ipſo* that they are Miniſters they may be Notars in Teſtaments? Or, If they muſt be admitted Notars?

S. A Miniſter may ſubſcribe as Notar in a Teſtament, tho' he be not a Notar admitted; and that by Reaſon of the Exception in the Act of Parliament, *Jam.* VI. Parl. 8. Cap. 133.

N. Quæ Ratio That a Teſtament made in *France* or *Holland*, according to the Cuſtom there, which is different from ours, ſhould be ſuſtained in *Scotland*, as to any *Scotiſh* Intereſt falling under the ſame?

S. A Teſtament made by a Perſon dying in *France* or *Holland*, according to the Cuſtom there, ſhould be ſuſtained in *Scotland*, tho' the Cuſtom be different; and even as to a *Scotiſh* Intereſt, falling under the ſame; Becauſe, *Teſtamenti factio* ought, in all Reaſon, to follow the Perſon. And Perſons dying any where, ought to be allowed to act or Teſtate according to the Cuſtom of the Place, as to all their *Jura perſonalia*.

N. IF a Minor, having Curators, may diſpoſe of his Eſtate by Teſtament, without the Curators Conſent?

A Minor of Thirteen Years, or thereabout, having made a Teſtament, and named the Perſon with whom he was boarded and bred in Family, his Executor and univerſal Legatar, without the Knowledge or Conſent of any of his Friends: *Quæritur*, Whether the ſaid Teſtament may be queſtioned upon Circumvention; without qualifying any other Circumſtance, but that it is *Dolus in re ipſa*, to elicit from a Perſon of that Age, a Right to all his moveable Eſtate, in Defraud of his Friends? ANSWER,

It is *casus Arbitrarius*; and
the Defunct had no Relation
ſuggeſt that the Defunct ſhould
ter, and did inform the Writer.

A Teſtament being made by
ſinio, and a little Time more, in
he had ſtayed for divers Years, and
was named Executrix and univerſal Legatarix, may be ſuſpected as *ſuſpicioſum & doloſum*; that being *dolus reipſa*, and *præſumptive ſo*, to prejudge Five of his Brethren and Siſters, who were in a poor Condition; in reſpect the Child had but lately paſſed Tutory, and choſen Curators: And the ſaid Teſtament was elicited from him without the Knowledge of his Curators and other Friends; and the Writer and Witneſſes were imployed by the ſaid Nurſe: And the Friends, apprehending that ſhe might take Advantage, dealt with her, That the Child might be ſuffered to ſtay in another Place; and ſhe was not only ſatisfied for the Time he had been with her, but they offered a Sum of Money to her, that he might be at Freedom. And 'tis ſo incident to Minors to be influenced, that when they are to chooſe Curators, the *Council*, upon Application will ſequeſtrate them.

S. A Minor having Curators, may nevertheleſs Teſtate upon his Moveables without their Conſent.

If a Minor, juſt coming out of his Pupillarity, ſhould make a Teſtament, and therein Name his Landlord, or ſo, with whom he is tabled; to be his Executor and univerſal Legatar, paſſing by his Friends and without their knowledge; and if there appear any undue Practice or Suggeſtion in the Caſe, the Minor may be judged to be leſed and circumveened. For, there is indeed a preſumptive *dolus in re ipſa*, and the Thing moſt ſuſpect, and, as the Author ſays, it is *caſus arbitrarius*. He ſubjoins another Caſe, of a ſickly Child, juſt paſt Pupillarity, and then teſtating in favours of his Nurſe, with whom he ſtayed, to the Prejudice of Five Poor Brethren and Siſters; and whereof all the other Circumſtances were true to my Knowledge. And yet, the Lords ſuſtained the Teſtament: *Which* may juſtly make all Men jealous, and indeed ſhould make the Lords themſelves moſt jealous of their own *arbitrium* in ſuch Caſes; for this was certainly one of the hardeſt.

Teſtament Execute.

N. IT appears, That the Teſtament is Executed as to Debitors, by Sentence againſt them; ſeing after Sentence, an Executor may Aſſign: And therefore, if the Executor die, the Debt may be confirmed, and purſued for by his Executors.

S. When Teſtaments are ſaid to be Execute, either as to Debitors, or ſo as to leave no Place for *non Executa*, with ſome other Queſtions of that Nature, hath been already conſidered, *Tit. Executors.*

Teſtament on the Wife's Part.

N. A Wife's Teſtament being confirmed; and her Husband as beſt knowing having given up the Inventar, both of Goods and Debts

Debts due to [illegible] the Goods, having given up the Wife's Jewels and [illegible] Debts due by him, having given up Debts, either ſimply heritable, [illegible] upon an Inſefment, or heretable *quoad Relictam*, upon Bonds whereof the Term of Payment is paſt; and ſo the *debita* being found to exceed *bona*, *Quæritur*, What in Law the Commiſſars ſhould do in ſuch a Caſe? ANSWER, The Wife's Jewels and Abulziements ought to be conſidered as *præcipua*, and not in Communion; and which ought not to be affected with the Debt: And it ought to be conſidered, if any of the Debts be moveable *quoad Relictam* and theſe only ought to affect the Wife's Part; ſo that what is free of the Inventar of the Husband's Goods will divide, if there were no Bairns *in familia*; and albeit there be Bairns but *foris familiat*, the Half of the Husband's free moveable Eſtate would be the Wife's Part; and ought to be confirmed as belonging to her, with her whole Jewels and Abulziements.

S. 'Tis evident, That the Wife's Jewels and Abulziements, ſhould fall as *præcipua* to her Succeſſors; and that they will have her Share of free Moveables, and of Debts due to the Husband, moveable *quoad Relictam*, with Deduction only of Debts due to the Husband moveable in like Manner. And the Diviſion in this Caſe, if no Children, or *foris familiat*, will be *bipartit*, and if Children *in familia*, *tripartit*: But the Jewels will be *præcipua*, as ſaid is.

N. WHEN the Husband ſurvives the Wife, and her Teſtament be confirmed; whether moveable Heirſhip will be deduced, as when the Husband's Teſtament is confirmed? *Ratio dubitandi*, There can be no Heirſhip, the Husband living: And on the other Part, the Wife's Executry ought not to be in better Caſe than her ſelf, if ſhe had ſurvived: And there can be no Bairns-part, until the Husband's Deceaſe *actu*, albeit *habitu*: And there is *eadem ratio* as to Heirſhip.

S. I would incline *no* Heirſhip in this Caſe, becauſe the Husband ſtill living. 'Tis true, tho' there can be no Bairns-part *actu*, until the Father deceaſe; yet here, where it is only *habitu*, it is deduced; And it may be thought, there is *eadem ratio* as to the Heirſhip; but ſtill the Heirſhip hath a peculiar Reſpect to the Husband's Death: And if by this Reaſoning the dying Wife's Part, ſhould be better than her Part ſurviving would be, it is but her Chance: But the Cuſtom in this Matter is to be obſerved.

The next Title is Teſtes; *for which, ſee Witneſſes.*

Third and Teind.

N. WHEN Lands are ſet for Third and Teind, ſo that the Maſter is not to be payed by the Hand of the Tenent, or by the Product of the Corns when they are reaped and threſhen; but has an Intereſt in the Corns and Bodies of the ſame, as the Tenent himſelf: Whether will his Executors have Right to the Third and Teind entirely, the Defunct dying before Separation; *eodem modo*, as if the Tenent who is *Partiarius* as to two Parts, ſhould die before Separation? *Ratio Dubitandi*, That there is no *Merces* or Duty payable to the Tenent: He ſowes the Ground for his own Uſe, and for the Uſe of the Maſter.

[illegible] Executors will have [illegible] they are *fructus percepti, & in bonis mariti*.

Vide Dictionary, Tenet. 1. *in fine.* In these Cases Questions may be proposed as to Third and Teind.

S. WHEN Lands are set for *Third and Teind*, so that the Master has an Interest in the Corns, as the Tenent himself; if the Master die before Separation, 'tis thought, his Executors will have Right to the *Third and Teind* entirely: For, 'tis like to an Executry Crop: And the Tenent is understood to have sown for the Master and himself. And suppose the Master died after the Separation; yet, if before the *Martinmas*, the Case is the same: For, if he died after the *Martinmas*, there could be no Doubt but the whole Year's Rent would fall to his Executor.

AND, if the Wife should decease after Sepaaation, when the *fructus* are *percepti, & in bonis mariti*; then, it seems she will only have her Share of the Executry. And, if she die before the Separation; It seems to be the same Case as of the Husband's Executry Crop, whereof he will have her Share.

Titles of Honour.

N. IF there be *feudum Comitatus, aut Reguli*, and the same descend to Heirs Portioners; *Quid Juris* as to the Title?

S. A Title of Honour, provided to Heirs whatsomevet, yet being indivisible, will fall to the eldest Heir Female: And even if a *feudum Comitatus* should be provided to Heirs Portioners; tho' the Heritage would divide; yet the Honour would remain with the eldest.

N. WHEN an Estate in Lands and Baronies is erected *in Comitatum*, with the Title, whereupon Infeftment follows: *Quæritur*, If the Estate be disponed or evicted, *Quid Juris* as to the Title; seing it is not given by Patent, but by Infeftment, as *Hæreditamentum*, and accessory to the Lands?

S. THO' an Estate, erected in an Earldom or Lordship, be disponed or evicted by Comprising; the Title cannot be convoyed, but will remain and follow the Blood.

N. A Patent of Honour being granted to a Person and his Heirs; *Quæritur*, If any of his Heirs may surrender the said Honour in the King's Hands for a new Right to himself, and other Heirs than is in the former Patent, albeit he was not served Heir himself? *Ratio Dubitandi*, He may sit in Parliament, though he be not Heir: On the other Part, though he be tolerate to sit in Parliament (being Heir of Blood) and no Person being concerned to object; yet he cannot dispose of such an Interest, unless he be served; seeing Titles and Patents of Honour, are not *expacto & providentia & Gentilia*, but are *Jura hæreditaria*, belonging to these that first get them, and their Heirs, and may be forfaulted.

A Title of Honour and *Jus Civitatis* being granted to the Receivers and their Heirs; *Quæritur*, If their Heirs owning and making use of the same, and medling or intending to medle with *Bona Defuncti*, will be liable as behaving? *Ratio Dubitandi*, That such Interests and Capacities, are not *in bonis* nor *commercio*, and are no *Mobilia*; and

where

where Persons are allowed *beneficium Inventarii*, they cannot come under Inventar and be valued; and therefore there needs no other *Actio*, but that they should own the same; and Creditors are not prejudged, seeing they are not the Subject of Execution and Diligence: And yet they may be forfault; these who have them for the Time, being *quasi* Heirs of Provision.

S. When a Man gets a Patent of Honour to himself and his Heirs; his Heir may enjoy the Honour and sit in Parliament, tho' he be not served. And, the using of a Title of Honour, is no *Behaviour*; for, it is not understood to be *in bonis*, nor affectable by Creditors.

N. When Lands are erected *in Comitatum*, with the Dignity and Vote in Parliament; *Quæritur*, If the whole Lands be evicted or disponed, what becometh of the Dignity annexed to the same? *Ratio Dubitandi*. That *Baronia* is *nomen dignitatis*, which is ever annexed to Lands; and that *Comitatus*, albeit a higher Dignity is of the same Nature: And therefore as a Barony being sold, the Disponer does not retain the Privileges of a Baron; so it ought to be in the Case of *Comitatus*; the Title being annexed to the Lands, and given in consideration of the same, and of the Estate sufficient to sustain the Title: And that there is a Difference betwixt a Title of Honour given by way of Patent, and that which is annexed to Lands.

S. 'Tis thought there would be no Distinction made with us, betwixt a Title of Honour given by Patent, *and* the same Title annexed to, and given with Lands; but the same Judgment made of the Title in both Cases.

Titular.

N. If the Titular be in Possession of Teinds, and die before *Michaelmass*; *Quid Juris?*

S. If a Titular of Teinds be in Possession by Drawing, and die before *Michaelmass*; it may be thought they would fall to his Executors, *tanquam sementem fecerat*. But this I doubt, unless he had survived the *Michaelmass*, the ordinary Term of Teinds. And yet it seems to be much the same with *Third and Teind*.

Tocher.

N. If either a Father or a Stranger be obliged to pay a Tocher, and Marriage do not follow, or be dissolved within Year and Day, *Quæritur*, To whom will the Tocher pertain? *Ratio Dubitandi*. All such Obligements are Conditional, and *causa data*: On the other Part, it may be pretended, That there is *Fictio brevis manus*, and the same Case as if the Tocher were given to the Woman, to the effect that she may give it to the Person whom she is to marry: So that tho' *Causa* ceaseth as to him, it doth not cease as to the Woman, which, ordinarily, is Affection and Relation to her, and that she may be *Dotata*.

S. When a Father or a Stranger binds to pay a Tocher; but Marriage either doth not follow, or is dissolved within Year and Day; tho'

it may be thought, That in this Case
man, and should return to her
Yet it is certain, that all will dissolve, and the Tocher will return to the
Giver.

N. A Father having granted a Bond to his Daughter; and thereafter having, by a Contract of Marriage with her Husband, given him a Tocher, without mention that it is in Satisfaction of that, or any other Provision; If, notwithstanding, it will be thought to be in Satisfaction? *Ratio Dubitandi*, That either the Father *cogitavit*, and remembred that he granted such a Bond, or did not remember; and if he did not remember, that which was not thought upon, cannot be said to be intended to have been satisfied and taken away: And if he did remember, and yet did not provide, that the Tocher should be in Satisfaction, it cannot be thought, that he intended that it should be so.

S. Tho' a Man should give a Tocher to his Daughter in her Contract of Marriage, without mentioning that it is in Satisfaction of any prior Bond or Obligement granted by him in her Favours; yet so it would be construed; for, *Debitor non præsumitur donare*: And the Law supposes him both to have remembred and satisfied his former Bond.

Next after this Title, the Author has a Latin *Exercise*, De Tractatu Suedico & Bonis prohibitis vulgo Counterband; *which may be well worth the reading, but needs no Remark.*

Posterity of Traitors.

N. IF, by our Law, the Posterity of Traitors be disabled *ipso jure*, both *ante nati & post nati*, as to any Estate pertaining to themselves, which is not profectitious from the Father after Treason? *Ratio Dubitandi*, The Doom of Forfeiture, bearing only Forfeiture for Life, Lands and Goods, without Mention of the Posterity & *Noxa Caput sequitur*; and *Lex* Julia *Majestatis*, is but the Municipal Law of the *Romans*, and is not authorised by any Act of Parliament or Custom of our's. The Act of Parliament King *Ja.* V. and the Act of Disabilitation of the Posterity of the Earl of *Bothwell*, and Rehabilitation of *John Stewart*, may be considered.

S. By our Law, the Blood of Traitors is tainted, and their Posterity disabled *ipso jure*; which would reach both *ante nati* and *post nati*: But it is not thought, that it would deprive them (with us) of any proper Estate, well settled in their Persons, independant on the Father's Forfeiture. As for the Law, *Cod. L.* 5. *Tit. ad legem* Juliam *Majestatis*; *Lex ista manifeste se ipsam damnat, & ab omnibus damnanda est: Nam quænam Imperatoria lenitas, qui vitam in supplicium concedit.*

Transumpts.

N. IF Tranfumpts under the Clerk-Register's Hand do satisfy in Improbations? *Ratio Dubitandi*, As in the Case of the Question, Decreets for proving the Tenor *in hac Litera* T.

If Transumpts of Saines out of the Books of Towns and Burghs, upon Proceſs to that Effect, as Uſe is, will ſatisfy the Production? Answer, They will ſatisfy; ſeeing the Prothocals are extant in the Town's Regiſter.

S. This of *Transumpts*, is ſpoke of, under the former Title.

Trebellianica.

N. AN Executor nominate after Confirmation, deceaſing before the Teſtament be execute; *Queritur*, Will he have Right to the Third and *Trebellianica*?

S. A Stranger nominate Executor, deceaſing after Confirmation, but before the Teſtament be execute; ſhould hardly have the Third of the Dead's Part: Since it is only given by the Act of Parliament, for the Office, and for executing thereof.

Truſt.

N. WHether a Bond in theſe Terms, *viz.* Bearing an Obligement to denude, and declaring the Truſt, be equivalent to an Aſſignation?

S. A Backbond declaring a Truſt, with an Obligement to denude, hath been found to be binding even againſt an Aſſigny and Arreſter. And ſo it ſeems to be better than an Aſſignation, which requires Intimation to complete it.

Truſtees in Infeftments.

N. A Right being granted to one, his Heirs and Aſſignies, for the Uſe and Behoof of another Perſon and his Heirs; *Queritur*, Whether the Caſualities of Ward, Marriage, *&c.* do fall by the Deceaſe, and with reſpect to the Perſon infeft, or to the Perſon to whoſe Behoof the Right is granted?

May the Perſon, to whoſe Uſe the ſame is granted, compel the Vaſſal to denude in his Favours, without the Superior's Conſent?

Though the Superior may pretend, that when the Right is to the Behoof of an Incorporation, that he has Prejudice: Yet, if it be to the Behoof of a ſingle Perſon, Can he refuſe to enter him, if the Vaſſal be content to denude in his Favours? *Ratio Dubitandi*, Though *Uſtarius* has an Intereſt, yet he is not Vaſſal; and the Superior cannot be urged to receive a new Vaſſal: And on the other Part, the Right being in Truſt and precarious, to the Behoof of the other; *ex naturâ ineſt*, that he may revoke and urge the Vaſſal to denude, and a Regreſs is implied, the Superior having granted the Right of the Nature foreſaid.

S. When a Right is granted to a Perſon, his Heirs and Aſſignies, for the Uſe and Behoof of another and his Heirs; if this *Behoof* be expreſſed in the Superior's Charter, he muſt expect his Caſualities of *Ward, Marriage, &c.* not from the Perſon infeft, but from the Perſon to whoſe Behoof the Right is granted, who may alſo compel the Vaſſal to denude in his Favours, and (I judge) may compel the Superior himſelf to receive him, ſince he conſents to the Truſt. But, if the Right was to the Behoof of an Incorporation, the Superior might very well decline to denude in their Favours: And, I think, he ſhould, in ſuch Caſe,

have his Caſualities from the Perſon infeft; for that ſeems to be the very Deſign of the Truſt, That the Superior may have a particular *mortal* Perſon, and not an *Incorporation* for his Vaſſal, leſt his Superiority ſhould be thereby rendered *ſterilis*.

A Truſtee committing Treaſon.

N. A Perſon having committed Treaſon, and having in his Perſon for the time, a Right to a Bond by Aſſignation, but in Truſt to the Uſe of another, and upon a Backbond declaring the Truſt: *Quæritur*, Whether or not the Sum due by Bond, will belong to the King and his Donatar? *Ratio Dubitandi*, The Right of the Sum is in the Perſon of the Traitor; and by the Backbond he is only Debitor, and obliged to denude: And he to whoſe Uſe it is entruſted, has not *Jus in re*, but *ad rem*; and a perſonal Action againſt the Truſtee, whereunto the King is not liable.

S. That this Sum ſhould fall to the King, notwithſtanding of the Backbond, is a Hardſhip that would ſcarcely take place, *niſi quando bona cauſa Fiſci.*

Tutors.

N. *TUTELA* being *munus publicum*, at leaſt *authoritate*, tho' not *utilitate*; If by our Cuſtom, a Tutor may be urged to accept the Office? Answer, *Negativè*: And yet he may be urged *cauſativè*, as *v. g.* If a Legacy be left to a Tutor nominate, he muſt either accept the Office, or want the Legacy.

S. The Anſwer is good; That a Tutor cannot be compelled to accept, unleſs there be a Legacy for him: In which Caſe, he muſt either accept the Office, or loſe his Legacy.

N. If a Tutor of Law, after the Year, compear to oppoſe the giving of a Dative; Will he be heard to purge after *Jus devolutum*?

S. A Tutor of Law, even after the Year, may be heard to purge, and oppoſe a Dative; *ſi modo res ſit integra*, and no Speciality in the Caſe.

N. As a Father hath Power to name Tutors, Is he ſo Tutor of Law, that without any Authority of the Judge or Service, he may adminiſtrate and grant Diſcharges?

S. A *Father* is underſtood to be Tutor of Law, and may adminiſtrate, without being either ſerved, or otherwiſe authoriſed.

N. A Tutor nominate by a Codicil; Ought he not to be confirmed; and the Nomination lie in the Commiſſar's Regiſter?

S. The Nomination of a Tutor by a Codicil, is as good as if in a Teſtament: And farther, a pure Nomination a-part, is alſo ſufficient. But in all Reaſon, ſuch Nominations ſhould be regiſtered; otherwiſe there can be no ſecure Dealing with ſuch Tutor.

N. If, where there is more Tutors, Payment may be made ſecurely to One?

S. Where

S. Where more Tutors are nominate; Payment can only be made to them as they are nominate; and not to One of them ſeverally, unleſs the Nomination ſo provide.

N. Quid Juris as to Tutors; If they may be charged? And where there are Letters of Horning granted againſt them for their Intereſt, upon the Debt of the Pupil; If their Eſcheat and Liferent will thereupon fall?

In what Caſe Tutors may be charged, or Pupils themſelves? *'Tis thought*, That *cogitandum eſt*, whether there be a Difference betwixt the Caſe of a Tutor, when there is a Decreet againſt the Pupil and againſt him, for Payment, and he has not alledged nor made appear that he has nothing of the Pupil's Eſtate in his Hands: *Et officium non debet eſſe damnoſum*; And when the Tutor is only charged for his Intereſt: Seing in the Firſt Caſe, there is a Decreet againſt him; and in the other, not: Or, If he ought to Suſpend, as being Debitor *ex quaſi contractu, eo ipſo* that he is Tutor, and is liable either to the Debt, or ought to ſhow that he cannot pay it.

S. Tutors may be charged with Horning for their Intereſt, for the Debt of the Pupil; and if they ſuſpend not, they may be judged guilty of Contempt, and ſo incur Eſcheat.

The Author would make a Difference, When a Tutor is *decerned* with his Pupil, to make payment, and when he is only *Charged for his Intereſt*. But certainly, in both Caſes he ought to Suſpend, for his own Security.

N. Quæritur, If a Woman may be Tutor Dative, or Curator? *'Tis thought*, That (tho' the Teſtator's Will be moſt to be followed in Teſtaments) ſhe cannot be Tutor Dative; becauſe it is *virile officium*. And a Woman, tho' ſhe will be Heir, failzieing Children; *& penes quem emolumentum, penes eum onus*; yet ſhe cannot be ſerved Tutor of Law: And the Law not truſting her, ſhe ſhould not be Dative. And tho' the Exchequer gives ſuch Tutories, it ſeems to be an Error, and Abuſe.

S. A Woman, with us, may be either Tutrix Dative or Curatrix: For tho' ſhe cannot be ſerved Tutrix; yet our Exchequer was always in uſe to give ſuch Datives. And Minors may chooſe Women to be their Curators.

N. If Brieves for ſerving Tutors of Law ſhould be direct to any others, but the Sheriffs? Or to other Judges, where the Defunct had his Domicile and his Eſtate? Seeing Infants and Pupils have no Domicile: And Services are oftentimes of Purpoſe before the Baillies of the *Canongate*; and in other Places, where neither the Pupils Parents did dwell, nor had they any Intereſt or Eſtate.

S. Brieves for ſerving Tutors of Law may be directed to any Judge Ordinary.

N. Divers Tutors being named conjunctly: *Quæritur*, If any of them deceaſe, Will the Nomination be void? Answer, It is thought, that Tutors and Executors have the Office *ſinguli in ſolidum*: So that any of them deceaſing, the Survivers continue, *Jure non decreſcendi.*

S. If divers Tutors be only named, *semble* that One of them die, the Survivers have still the Office: But if they be named to be joint Tutors, One of them dying breaks the Tutory, because of the Nomination.

N. A Mid-brother having left Children: *Quæritur*, Whether will his elder Brother or younger be Tutor to them? *Ratio Dubitandi*, That the younger Brother will not succeed; *& penes quem onus, penes eundem emolumentum; Et è contra*, If the Mid-brother's Children should succeed to their Father; the younger Brother will be Heir to them, tho' not to their Father.

S. The younger Brother is reckoned Heir-general to the Mid-brother deceasing; and therefore hath the Tutory of his Children, tho' the Heritage, if Conquest, would *ascend* to the elder Brother.

Tutor and Administrator of Law.

N. Quær. IF Debitors may pay the Father, as Tutor of Law, *sine inquisitione*, and without some Authority of the Judge competent? Seing there may be Prejudice to the Pupil, if the Father be *prodigus*, or otherwise unfit.

S. A Debitor *may* make payment to the Father, as Tutor of the Law: But it is safer not to do it without a *Sentence*, and the *Authority of a Judge*: For Collusion is readily suspected in such Cases.

Tutor Ratione Rei.

N. Quæritur, WHETHER a Person, disponing his Estate to a Pupil or Minor, may appoint Tutors and Curators for Administration of it during Minority? Answer, He may appoint Tutors or Curators to administrate: But the Question remaineth, whether he may appoint a Tutor, not only *rei suæ*, but *Personæ*; and to any other Estate belonging to the Pupil.

S. A Person disponing his Estate to a Pupil or Minor, may appoint Tutors and Curators to him, for Administration of it during his Minority: But he cannot appoint a Tutor *personæ*, nor to any other Estate belonging to the Pupil; for the Right of such an Appointment is founded in the *paternal Power*.

N. Quæritur, The Father being deceased, may the Grandfather name Tutors to his Grandchildren?

S. The Grandfather cannot name Tutors to his Grandchildren by his Son deceased: But, if the Father of the Children had continued *in Familia* with the Grandfather, it might be thought otherwise.

N. There being no Place to a Dative till after Year and Day; *Quæritur*, If the neareſt Agnat may oppose the giving a Dative? Or, If *Jus* be fully *devolutum* to the King, as in other Cases, *Juris devoluti?*

S. It

S. It is anſwered above, *Cap. Tutors*, That even after Year and Day, the neareſt Agnat may oppoſe a Tutory Dative: And, if *Res* be *integra*, and no Exception againſt the Agnat, he ought to be preferred.

Tutory.

N. FIVE Perſons being named Tutors, whereof Two to be *ſine quibus non*, *viz.* The Defunct's Relict, and another; and the Relict being married, and the other *ſine quo non* deceaſing: *Quæritur*, Whether the Tutory falleth? And if it be void; Whether the neareſt of Kin of Age may be Tutor of Law? Or, If there ſhould be Place to a Tutor Dative? And, If in that Caſe, the ſurviving Tutors ſhould be preferred to all others? *Ratio Dubitandi*, 1*mo*. Tho' the Defunct did expreſs his Reſpect to the *ſine quibus non*, ſo that during their being Tutors, they ſhould be *ſine quibus non*; he did alſo expreſs his Confidence in the other Tutors above all others, by naming them Tutors: So that, for the Reaſon foreſaid, it may appear, That they ſhould continue Tutors; at the leaſt, That, for avoiding of Queſtion, they ſhould be preferred to be Datives. 2*do*. The next neareſt of Kin ſhould not be Tutors, ſeing the Defunct did not truſt them. The Caſe of my Lord *Montroſe*, his Father having named his Mother and the Earls of *Perth* and *Haddington*, *Drumelzior*, and Sir *William Bruce* to be his Tutors.

S. When a Father names Five Tutors, whereof his Relict and another to be *ſine quibus non*; If the Relict marry, and the other *ſine quo non* deceaſe; 'tis thought, The Tutory, in ſtrict Law, falleth. But ſince the Father, by his Nomination excluded his neareſt of Kin; it ſeems more reaſonable, to admit the ſurviving Tutors, upon a Dative, than to make place for a Tutor of Law.

U.

Union.

N. THERE being an Union in a Charter, of Lands in diverſe Shires; ſo that one Saſine may be taken for all: *Quæritur*, If the Heir may be ſerved in the Shire where Saſine is to be taken, as to all the Lands? In reſpect the Lands in other Shires are, *fictione juris*, and by reaſon of the Union, thought to be there: Or if there muſt be a Service by a Commiſſion, or Two Services in the ſeveral Shires?

If notwithſtanding of the Union, Saſine may be taken of both the Lands, ſeing the Charter bears that *una erit ſufficiens*, and not that it ſhall be neceſſary? And if the Saſine may be quarrelled, as not being at the Places where Saſine is to be taken?

Item, If the taking Two Saſines upon the Retour, will import a renuncing of the Union; ſo that a Saſine cannot be taken thereafter at the Place of the Union, upon Reſignation or otherwiſe?

S. WHEN Lands in different Shires [illegible] one Sasine appointed to be taken for all at the [illegible] follow, That the Heir might be served in [illegible] taken, as to all the Lands, tho' in other Shires. But in this Case, a Service by a Commission is the clearer and safer Course. And in effect, such Unions are but Confusion. However, if the Union bear that *una sasina erit sufficiens*, it will certainly serve, tho' Sasine for Superabundance, may be taken at the other proper Places. And if, upon the Retour, Two or more Sasines should be taken; yet it will not import a Renouncing of the Union, being only done for Superabundance.

The Two next Titles; Universalia augmentum recipiunt, *and*; Quando universitas delinquit, *are but Citations.*

V.

Re-entering of Vassals.

N. WHEN a Right holden of the Superior is reduced; Whether the Superior be obliged to Re-enter without a Composition?

S. IT seems, the former Vassal, in this Case is *in statu quo*; and so neither Re-entry nor Composition have place.

The next Title, Vectigalia & Pedagia, *is but* Latin *Citations.*

Vinco Vincentem.

N. Quæritur, IN what Case the *Brocard* holdeth, *Si vinco vincentem, vinco te?* ANSWER, *Ubi est eadem Ratio*; as, *v. g.* If there be Three Compriſings, and the laſt Compriſer be firſt infeft, and thereafter the firſt, and the ſecond in the laſt Place; but if there is an Inhibition at the Inſtance of the ſecond, before the Debt of the the third Compriſer; The ſecond will be preferable to the third; who will be preferable to the firſt; and yet the firſt will be preferred to the ſecond.

AS in the Caſe of Adjudication and Infeftment thereupon, the Adjudger may exclude the Superior's Ward falling by the Debitor; *Quæritur*, If he may exclude and be preferable to the Liferent, having the firſt Infeftment; *quia ſi vinco vincentem, vinco te?* ANSWER, He is not preferable to the Liferent: And the *Brocard* doth only militate *ubi eſt eadem Ratio vincendi:* And the Adjudger *vincit* the Superior, becauſe he is infeft holden of him: So that there can be no Ward: But cannot upon that ground, *vincere* the Liferenter, becauſe he is alſo infeft, and has a prior Infeftment, tho' tho baſe, yet publick; and which therefore doth exclude the Adjudger's Infeftment, being poſterior, tho' it would not exclude the Superior as to his Caſuality, becauſe baſe, and not confirmed by him. *Ballencrief. Vide Debitor and Creditors*, Queſt. 3. *Litera* D.

S. THE

S. THE Author gives a ſmooth Anſwer to the Queſtion, In what Caſe the Brocard holds, *Ubi eadem eſt Ratio*, viz. *Ubi eadem eſt Ratio*. But this needed long Explication; as appears by the foreſaid Caſe of Three Comprisings: Where the *Firſt*, as having the prior Inſeſtment, and not liable to the Inhibition of the Second, will be preferred to *him*. But then the *Third* Comprising firſt inſeſt, but excluded by the *Second*'s Inhibition, ſhould recur againſt the *Firſt*: Which makes a plain Circle. And ſuch Caſes, now, by reaſon of the Act of Parliament 1661, for the *pari paſſu* of Comprisings, and the *Sale* of Lands, and the *Rankings* therein requiſite, are more frequent than ever. And the Author's *Ubi eadem Ratio*, ſolves nothing.

IN the Caſe of an Adjudication and Inſeſtment thereon, where the Adjudger excludes the Superior's Ward, falling by the Debitor; and yet a prior baſe Liferent cled with Poſſeſſion, will exclude the Adjudger; the Superior, who conſented not to the Liferent, recurs. And 'tis true, as the Author ſays, *Non eſt hic eadem Ratio vincendi*; becauſe the Adjudger *vincit* the Superior, as being inſeſt by him; but cannot therefore *vincere* the Liferenter; in reſpect his Inſeſtment, tho' baſe; yet, being cled with Poſſeſſion, is preferable to the Adjudger thereafter inſeft. But, How doth this mend the Matter; ſeing ſtill, if the Adjudger were in Poſſeſſion, the Liferenter would exclude him: And if the Liferenter were in Poſſeſſion, the Superior would exclude her. And then, if the Superior get Poſſeſſion, the Adjudger recurs upon him. But in this Caſe, I would prefer the Liferenter, becauſe preferable, in Law, to the Adjudger; and the Adjudger preferable to the Superior, by the Superior's own Conſent: And the Superior, once thus excluded, is ſtill excluded.

THERE was lately before the Lords of Seſſion, a Caſe of the Ranking of Three Creditors; whereof One inhibits before contracting of the Second's Debt: But the Second ſecures himſelf by an Inſeſtment of Annualrent: And then the Inhibiter, and alſo the Third Creditor, whoſe Debt was prior to the Inhibition, did adjudge *pari paſſu*. The Inhibiter contended, That whatever his Inhibition did clear of the Eſtate, ſhould belong to him as Inhibiter and Adjudger; *That* being the juſt Effect of his Diligence; and that, by removing the Annualrenter prior to both their Adjudications, he ſhould have the ſole and full Benefit of the Annualrent ſo reduced.

ON the other Side, it was argued both for the *Annualrenter* and the *ſimple Adjudger*, That the Inhibiter could only plead his Inhibition, to free himſelf from the Prejudice of the *Annualrent* as to the Share that would have fallen to him with other Adjudgers; ſo that indeed he ſhould have this Share free of the Annualrent as if no ſuch Annualrent had been granted: But that he could not contend to have the Benefit of the full Value of the Annualrent; for that the other ſimple Adjudger would have his Share, but ſtill with the Burthen of the Annualrent: And thus the Eſtate ſhould divide betwixt the Two Adjudgers; but only with this Difference, That the inhibiting Adjudger ſhould have his Part free, as if the Annualrent had not been granted; and the other Adjudger ſhould have his Share alſo, but with the Burthen of the Annualrent, as preferable to his Adjudication.

BUT it was ſtill replied for the inhibiting Adjudger, That his Inhibition did *Firſt* clear the Eſtate of the Annualrenter. *Secondly*, That his Adjudication enſuing, muſt affect and draw whatever he had ſo cleared: And, That in all this the Annualrenter could not complain; becauſe he had purchaſed the ſame unlawfully, contrary to the Inhibition; And,

That the Third ſimple Adjudger, [illegible] of the Annualrenter's being ſolely caſt on him, [illegible] undoubtedly preferable to his Adjudication, [illegible] that had not ſecured his Debt by Inhibition, as the other Adjudger had done. And this was further illuſtrated by ſuppoſing, That inſtead of the Annualrent, the common Debitor had granted an irredeemable Diſpoſition of (perhaps) the Half, or more, of his Eſtate: Yet, the firſt Adjudger inhibiting, reducing this irredeemable Right, would have had the ſole and full Benefit of it, until he were payed; and the ſimple Adjudger could crave no Benefit with him therein.

But, notwithſtanding of this Reply, *the Lords found*, That the inhibiting Adjudger could only draw ſuch a Share as would have belonged to him, if there had been no *Annualrenter* poſterior to his Inhibition; but could not extend his Inhibition and Adjudication to the full Avail of the Annualrent, to the Prejudice of the Co-adjudger, and the Annualrent affecting the ſame. And which they found alſo in a former Ranking, where they had ſettled this Rule; and therefore would not alter, albeit the Reaſon of Law, That the inhibiting Adjudger ſhould have the full Effect of his own Diligence, and that the Inſtance of an irredeemable Right, inſtead of a redeemable Annualrent, would certainly afford it to him; appeared in the Judgment of many to be unanſwerable.

My Lord *Stairs* in the laſt Edition of his Inſtitutions, Pag. 649 ſtates the ſame Caſe of Two Adjudgers, and One Annualrenter prior to both; and ſuppoſes One of the Adjudgers to have inhibit before the Annualrent, and the other not: But then in the Application, he ſuppoſes all Three to be equal Creditors each of them, for *Four Hundred Pounds* of Annualrent, and the Free Rent of the Eſtate to be *Six Hundred Pounds*. Now to divide this according to the true Rule of Law, the Adjudger Inhibiter would not only have his Share, that is 200 l. of the *Six*; but the Annualrenter alſo drawing *Four Hundred Pounds*, he removes the Annualrenter in ſo far as to his Prejudice; which gives the Adjudger inhibiting, clearly his whole 400 l. and the Annualrenter for his 400 l. he certainly is preferable to the ſimple Adjudger, but for want of Subject can only have 200 l. and ſo muſt loſe the other Two; and the ſimple Adjudger be totally cut off: Which is plain and downright Law. But my Lord *Stair* divides thus. The Annualrenter *Four Hundred Pounds*, as preferable to both the Adjudgers, (tho' he be only preferable to One) and ſo leaves them only *One Hundred Pounds*. But then, ſays he, the Adjudger inhibiting, will claim as much of the *Six Hundred Pounds*, the common Stock, as he would have had, if there had been no Annualrenter: And thus he gives him 300 l. free of the Annualrent; but adds, that ſo the Annualrenter ſhould only have the remaining *Two Hundred Pounds*. But wherefore, ſince his Annualrent carries him to 400 lib. and he is preferable to the ſimple Adjudger, who only can compete with him; ſhould he not have the whole remaining Three Hundred Pounds, all that the Subject affords? Certainly, in Law or Reaſon, this cannot be anſwered; and the laſt Adjudger, if ſo totally cut off, hath himſelf only to blame, that did not adhibite, as his Co-adjudger did. But my Lord *Stair* would only give the Annualrenter Two Hundred Pounds of the remaining Three: And for this Reaſon, That the Annualrenter could not return upon the other Adjudger, as being prior to him; which is hard to be underſtood: For, if, by *the other Adjudger*, he mean the ſimple Adjudger; then the Annualrenter, being prior to him, ſhould carry all from him, and not leave him ſo much as *One Hundred Pounds*. And that he cannot

mean

mean by the other Adjudger, the Adjudger-Inhibiter, is evident: For the Annualrenter, in Law, muſt wholly ſucceed to him. But the Fundamental Miſtake in all this Affair is, That they Firſt ſtate the *pari paſſu* Adjudgers, as dividing the whole Subject: and then bring in the Annualrent, tho' clearly preferable to One of them, as only a Servitude upon both; of which Servitude, they allow the Inhibition to clear the inhibiting-Adjudgers Part, but then they leave the Annualrenter no Recourſe, for what the Inhibiter takes from him againſt the Second Adjudger; Albeit in all Law, Reaſon and Senſe he be preferable to him. So that this Scheme is wholly arbitrary.

However, if this reaſoning ſhould hold, the old *circulating* Caſe of the Three Compriſers, above ſet down, had made no ſuch Difficulty, for the Three Compriſers come now in certainly *pari paſſu*, and ſo all of them have their Share, Four Hundred Pounds each, *for Example* of the ſaid Six Hundred Pounds of Stock. And then the Second Compriſer who inhibites, could only pretend to the Half of the Six Hundred Pounds, as if the *Third* Compriſer poſterior to him, had not been in the Field. And for the remaining Three Hundred Pounds, it ſeems it muſt divide betwixt the Firſt and the Third: For the Second Compriſer Inhibiting, gets all his Draught as ſaid is, and ſo what remains muſt divide: For here it is to be noted and remembred, That every One of the Compriſers are ſtated effeing to Four Hundred Pounds, ſuppoſed to be their Annualrent as in the former Caſe. But my Lord *Stair* in his Diviſion, gives to the Adjudger not affected with the Inhibition, Two Hundred Pounds: But then to the Adjudger-Inhibiting he allows his Share, as if the Adjudger ſtruck out by the Inhibition, were not exiſting; and ſo he gives him Three Hundred Pounds and no more: Albeit it be manifeſt, That if his Inhibition had it's juſt Effect, it would give him all the Third Adjudger's Part. But, *he ſays*, he can claim no more againſt this Adjudger, ſeeing his Reduction upon his Inhibition does not ſimply annull this Adjudication, whereas in Effect it doth; So that this Diviſion cannot be underſtood. And the plainer Method had been, Firſt to State the Inhibiting-Adjudgers Share, which would have been the Half, becauſe he ſtrikes wholly out the Third Adjudger. And then to have divided the remaining Half, betwixt the Two other Adjudgers, who ſtand clear of each other. And yet this Diviſion, tho' fairer and clearer, had not been ſo legal, in reſpect the Inhibiter gets not the full Effect of his Inhibition, as he ought to have. And then the remaining Two Hundred Pounds of the Six, ſhould have been divided betwixt the other Two, each a Hundred.

W.

Wadſets. Vide De Hypothecis.

N. WHAT way ſhall a Creditor be ſecured as to a Wadſet, or Money due thereupon? Answer, He may compriſe the Wadſet-Right; and if he cannot compriſe, the Term of Payment of the Creditors Debt not being come, he may arreſt the Sum due upon the Wadſet, to be furthcoming, in caſe of Redemption. *Vide Arreſtment of Conditional Debt*, in litera *A*.

S. It is evident there is no Way for a Creditor to be secured in a Wadset or the Money of it, belonging to his Debtor, [illegible] *Arresting* or *Adjudging*, as the Diligence may be proper and have place.

N. If another Creditor comprise the Wadset; Will he be preferred to the Arrester, before the Order, tho' anterior? ANSWER, He will be preferred, being in the Right the Time of the Redemption: And the Money being only due to these who have Right to the Land, and must renounce and *retrovendere*.

S. A Creditor comprising the Wadset-Right, will, no Doubt, be preferred to another Creditor arresting before the Order: Because, the Arrestment can have no Place in this Case.

N. THE Wadsetter deceasing after an Order, and the Money being consigned: *Queritur*, Whether will it belong to his Heir or Executor? *Ratio Dubitandi*, Money, of it self is moveable. And on the other part, *Surrogatum sapit naturam surrogati*; and it is due to be given *ratione rei*, and a Renunciation to be given by the Heir.

S. THE Money consigned will belong to the Heir, who must renounce: But after Declarator, it will belong to the Executor.

N. Quid Juris in the Case of a Contract, whereby Lands are sold, and a Price payable; If the Buyer charge for Implement, and consign the Price, and the Disponer decease; Whether will it belong to his Heirs or Executors?

S. 'TIS Answered above, That the Money will belong to the Heir, according to the Condition of the Bargain and Contract.

N. AFTER Redemption of a Wadset, or Comprising, the Wadsetter or Compriser dying; whether is it necessary that their Heirs be infeft and renounce, or if a Renuciation will be sufficient; the Wadset or Comprising being loosed and extinguished by Redemption?

S. WHEN after Redemption of a Wadset or Comprising, the Wadsetter or Compriser dies, a *Declarator* may be carried on against the apparent Heir; and no Doubt a Renunciation with a Declarator will extinguish, tho' the Heir should not be infeft.

Wadset Heretable or Moveable.

N. WHEN there is a Provision in a Wadset-Right, that Requisition should not loose the Infeftment: *Quæritur*, If after Requisition the Sum be Heretable or Moveable? *Ratio Dubitandi*, The Creditor declares his Resolution to have the Sum: And on the other Part, a Sum due upon a real Right appears to be heritable. *It is thought*, That until it be actually uplifted, it should be heritable.

S. 'TIS thought Requisition will not make this Sum Moveable: But if the Creditor should pursue and Charge for the same, this appears to be all he can do to make it moveable. And it alters not the Case, that the heritable

ritable Security continues. For a Sum may be Moveable, and fall to Executors, and they get withal the heritable Security, as in the Case of bygone Feu-Duties. But unless the Charge were given expresly *ex animo* and *Liege Poustie*, it should remain heritable.

N. If the Wadsetter be Year and Day at the Horn; and thereafter the Wadset be redeemed, *Quæritur*, If the Superior will have the Wadsetter's Liferent of the Sum due upon the Wadset.

S. Tho' the Wadsetter be Year and Day at the Horn, and thereafter the Wadset be redeemed; there appears no Reason, that the Superior tho', it may be, called in the Declarator, should have the Liferent of the Sum during the Wadsetter's Life: For the Superior's Interest ceases by the Redemption and Declarator, and the Sum thereafter is moveable, and should fall under the simple Escheat.

N. If before Redemption, the Wadsetter dispone the Lands, suppose they hold Ward, will they recognosce simply, or only as to the Wadsetter's Interest? *Ratio Dubitandi*, The Wadset is upon the Matter, but a Hypotheck: And he can forfault no more than he has. And on the other part, Whatever Paction be betwixt the Creditor and Debitor; yet as to the Superior, the Wadsetter is properly and formally his Vassal: So that *ex ejus persona*, he hath all the Fruits and Casualities of Superiority.

If a Wadsetter holding of the King, commit Treason; Whether or not he forfaults the Lands, or only his Interest of Wadset? *Ratio Dubitandi*, As in the former Querie: And that the King should have *hominem vivum & mortalem consistantem*; and all the Casualities belonging to his Superiority, or to His Majesty, as King, *ex morte vel delicto vasalli*: And albeit the Right be redeemable; yet that is to be understood, as long as the Right is in the Person of the Wadsetter; but not after it is extinct by Forfaulture.

S. Tho' a Wadsetter of Ward-Lands dispone without Consent; nothing can recognosce, save the Wadsetter's Right: For the Reversion, whether incorporate or only registred, will still remain with the Debitor. And thus, a Wadsetter committing Treason, forfeits only the Wadset: But the Reversion remains intire, and is now also secured by the Act of Parliament 1690, against the Act of Quinquennial Possession.

Wadset proper.

N. If a Wadsetter of Ward-Lands die before Redemption; Will the Marriage of his Heir fall? And if it fall; Will the Debitor, if he redeem, be liable to refound the Avail?

S. A Proper Wadsetter of Ward-Lands dying before Redemption, the Marriage of his Heir will fall: And the Debitor redeeming, will not be concerned; because, the Wadsetter *debuit melius sibi providere*.

N. In Proper Wadsets, a great Part of the Sum being paid; Will the Wadsetter be countable for the Duties effeirand thereto?

S. When any Part of the Sum of a proper Wadset is payed, it should be ſo payed, as to reſtrict the Wadset, or make the Wadsetter accountable, effeirand thereto: For otherwiſe, the Wadset will ſtand good: And the Payer muſt look after his Money, to repete it, or get it allowed.

Ward.

N. A Compriſer of Lands holden Ward being infeſt: *Quæritur*, If theſe Lands will Ward by the Deceaſe of the Compriſer; and if the Marriage of his apparent Heir will fall? *Ratio Dubitandi*, A Compriſer is but an *interim* Vaſſal, for Surety of his Debt. And upon that Conſideration, ſuch a Right, in *England*, is conſidered as a *Chatel*, and not Inheritance. *Vide Compriſing*, Queſt. 14. *litera* C.

If the Compriſing be redeemed; Will the Debitor be liable to refound the Damage ſuſtained by the Ward and Marriage?

Quæritur, If the Ward of the Compriſer's Heir will determine and expire upon the Redemption?

Quid Juris in the Caſe of Proper Wadſets; If the Debitor after Redemption, will be liable to refound the foreſaid Damage? The Difference being, That a Compriſing is an involuntar Right, and the Wadſet voluntar; ſo that the Creditor ſeemeth to take his Hazard.

S. 'Tis already ſaid, That neither Ward nor other Caſuality, ſhould vake by the Deceaſe of the Compriſer within the Legal: For, ſince the Law allows him to compriſe for his Debt, and appoints him a yearly Duty to the Superior for his Entry; the Superior ſhould claim no more, unleſs the Compriſer become his Vaſſal indeed by the Expiration. And thus 'tis plain, That the Debitor redeeming, would not be liable to refound either the Ward or Marriage: For none falls, as ſaid is. And there is no Reaſon, That ſuch a Ward and Marriage, pretended to fall by the Compriſer, ſhould affect the Debitor. But if by the Compriſer's Death, the Ward of his Heir ſhould fall: it would, no Doubt, expire upon Redemption: But in Reaſon, it ſhould not fall. But it is otherwiſe in Proper Wadſets, where, *as hath been ſaid above*, the Creditor and Wadſetter ſeem to take his Hazard of the Caſuality.

N. A Creditor being infeft in Ward Lands, upon a Wadſet bearing Back-Tack; will they Ward upon his deceaſe, and the Minority of his Heir?

If they Ward, will the Debitor have the Benefit of the Back-Tack, during the Ward? The Superior having in Effect conſented thereto.

S. Suppose the Ward do fall upon the Wadſetters deceaſe, yet the Debitor muſt have the Benefit of his Back-Tack, becauſe, in a manner conſented to by the Superior: And at moſt, the Superior can by the Ward, get only the Back-Tack Duty; Which yet it ſeems the Heir of the Wadſetter may cut off, by requiring his Money.

N. If the Ward of a Perſon who is apearand Heir, as to a Wadſet Right, do not determine by a Redemption of the Wadſet? And the ſame Queſtion may be, as to the Liferent of the Perſon infeft upon the Wadſet? Answer. It is thought, that it will determine; his Right being

being *Jus resolubile*. And that Ward be considered as *Dominus Dominium directi*; and being granted, it may seem that the Debitor cannot be prejudged, yet that is to be understood when the Vassal has an absolute Right; but not when the Right is qualified and *resolubile*.

S. The Answer is good, That both the Wadsetters Liferent, and the Marriage of his apparent Heir falling to the Superior; do determine by the Redemption: And very justly, because, as the Author says, it is *Jus resolubile*, and so owned by the Superior.

N. If the appearand Heir of Ward Lands being *pubes* and *Doli capax* commit Treason, will his Ward be determined? *Vide* Marriage. *Quæstiones* 17, & 18. *in litera M.*

S. An apparand Heir of Ward Lands being *doli capax*, which I take to be at *Sixteen Years of Age*, commits Treason; his Ward can no longer subsist, but the Forfeiture will fall to the King.

N. Lands holding Ward being full the Time of the Vassals decease, by an Infeftment upon a Comprising; but the Comprising thereafter redeemed by the Debitors general Heir, being Minor; *Quæritur*, If the Superior will have the Ward? Answer, It is thought, not; seeing the Heir does not succeed to the Lands as Heir to his Father, who was not Vassal; but as general Heir has Right to the Reversion, whereupon he has Redeemed: and *Modus & Forma* is much to be considered.

If the Comprising does extinguish, being satisfied by Intromission, *Quæritur*, If the Heir being Minor, there will be a Ward in that Case? Answer, It is thought, not; seeing the Comprising does extinguish not *ab initio*, but *ex post facto*; and the Heir cannot be said to be the apparent Heir of a Vassal, the Lands being full, as said is, the Time of his Father's decease: And albeit there is not a formal and ordinar legal Reversion, no Money being to be paid, yet there is upon the Matter *Jus Retrahendi* to the apparent Heir. *Vide* Comprising. *Quæst.* 37. *litera C.*

S. When Ward Lands, are full the Time of the Vassal's decease by a Compriser infeft, and the Comprising redeemed by the Compriser's general Heir, Minor for the Time; The Author thinks, That by his Redemption of the Debitor's general Heir, whose Father was not Vassal, the Superior should not have his Ward: But if the Redemption satisfy and extinguish the Redemption, then the Debitor must be held to have died Vassal *retro*, and this general Heir will not recover the Right of the Lands, tho' the Compriser should renounce; unless, he be either served Heir in special, or obtain the Compriser to denude in his Favours: But still this denuding after Redemption, extinguishes the Comprising, and the apparent Heir will not get Right to the Land, unless, he be entred by the Superior; who no Doubt will see to his own Casuality: If the Compriser, in this Case should simply make over his Comprising to the apparent Heir, and the Superior receive him, then, upon expiring of the Comprising, he becomes a new Vassall: But, if the Comprising be either payed or satisfied within the legal, the Superior will have his Casuality by the Death of the Debitor as said is. The Author indeed adds, That if the Comprising extinguish by Intromission, there will be still no Ward of the Debitor's Heir, tho' Minor: But, seeing a Comprising *quovis modo* extinct, is judged to be extinct *ab initio*, the Author is certainly mistaken.

Granter's Heir-General, who, as ſuch, [illegible] Diverſion; yea, the Superiory whether there were a Reſignation in the Caſe or not, could not be compelled to receive him without regard to the Caſualty vaking by Granter's Death; ſeeing in this Caſe, the Wadſet becomes as extinct, and therefore, in Reaſon, there ſhould be Place for the ſaid Caſualty.

Ward-Lands.

N. Quæritur, A Superior of Ward-Lands having confirmed a baſe Infeftment, whether will the Subvaſſal be lyable to the Ward, or Nonentry falling by the Deceaſe of the Vaſſal? *Ratio Dubitandi. Hope* giveth only that Reaſon in the Caſe of Lands holden of the King, that Confirmations bear a *Salvo* of all Rights, Duties, and Services.

By the Act of Parliament The Superior during the Nonentry and Ward, had Right only to the Feu-Duty due to the Vaſſal by the Sub-Vaſſal; *Quæritur,* If the Superior be in the ſame Caſe by the Confirmation, as he was by the ſaid Act of Parliament; notwithſtanding the Act of Parliament 1606, in favours of Subject Superiors of Ward-Lands.

S. By the Act of Parliament *Jam.* IV. Pag. 14. *Cap.* 71. 'Tis plain, That the King, Lords, Prelates, Barons and Freeholders, were allowed to ſet their Lands in Feu-Ferm; and, That *That* Law was a Ratification or Confirmation from the Superior, to ſecure the Feuar, that his Feu-Farm ſhould remain good; he paying the Feu-Farm-Duty; notwithſtanding any Ward or Nonentry that might vake by the Setter: And all required, was, That the Feu ſhould be ſet to a competent Avail, which was judged to be the Retoured Duty. And by the Act of Parliament *Jam.* IV. Pag. 6. *Cap.* 91. the ſame Allowance ſeems to be given to every Man, both Spiritual and Temporal, to ſet their Lands in Feu, and that, without Hazard either of Recognition or Forfaultnre. So that by theſe Acts, *Feuing to a competent Avail,* ſeems to have been allowed to all Perſons, without any Hazard to the Feuar from any Caſuality or Delinquency that might befall the Setter. But theſe Acts, by the Act of Parliament *Jam.* VI. Pag. 18. *Cap.* 12 were reſtrained, and declared not to extend to the Vaſſals of any ſubaltern Superior, holding their Lands ward of their ſaid Superior. And 'tis ſtatute, not to be leiſom to them to ſet their Lands in Feu, without the Confirmation of their Superiors: And any Alienation otherwiſe, is declared null. And this Explanation and Statute, is extended to the King and Prince, and Vaſſals holding Ward of them, reſcinding all former Acts in the contrair, *Char.* I. Par. 1. *Cap.* 16. And ſo the Allowance to *Feu* given by Law, was firſt reſtrained, and then diſcharged.

But next comes the Queſtion, as to the *Import* of the Superior's Confirmation *De me.* And that *this* Confirmation differs from a Confirmation *a me,* is obvious: For, the Confirmation *a me,* makes the Perſon confirmed, immediate Vaſſall to the Superior confirming: Whereas the Confirmation *de me* doth only ſecure the Perſon confirmed, againſt the Caſualities that may fall to the Superior, or his Author; by his or their Delinquency. And ordinarly all ſuch Confirmations are given *ſalvo jure; Superior is* confirming: And therefore 'tis thought, that, whether the Confirma-

Confirmation be by Charter or by Resignation, it hath the same Effect. But then the Question recurs, Whether this Confirmation be only to secure against Feudal Delinquencies, such as Recognition and the like; or also, against the Casualities of Ward, Marriage and Nonentry? For Nonentry here is not reckoned a Feudal-Delinquency: And it appears to be more generally held, that these Confirmations should only secure against Delinquencies, but not against the other Casualities that fall to the Granter's Author; such as Ward, Marriage, and the like.

And thus the *Author* inquires, If the Superior's Confirmation *De me*, be of the same Import with the said Acts of Parliament *Jam.* VI. & *Jam.* IV.? And 'tis thought, still to be of the Import to secure against Delinquencies only. But then, as to these, it secures the Sub-vassal, whatever way his Sub-feu be granted; whether *Blanch* or *Feu*.

N. If the apparent Heir of a Vassal of Ward-Lands renounce to be Heir, will his Marriage notwithstanding fall either single or double? *Ratio Dubitandi*, he was never Vassal; and *celibatus* is not *delictum*.

If Marriage be real and affects in Prejudice of singular Successors? *Ratio Dubitandi*, *Hope* is for the Affirmative, and alledgeth Decisions. To consider *Halton*'s Case: On the other Part, in *Novodamuses*, amongst Incumberances that affect, there is no Mention of Marriage. *2do.* The Marriage respecteth not the Lands but the Person, and his other Estate as to the Value. *3tio.* It may appear to be a personal Prestation, whereto the Person and his Right, during his, and his Heirs Time is liable; but doth not affect a singular Successor, as in the Case of Ward.

S. Tho' the apparent Heir of a Vassal of Ward-Lands, do renounce to be Heir; yet his Marriage will fall: For, it is enough that his Predecessor was Vassal. And this Marriage is real, and will affect a singular Successor: And after the Marriage declared, and the Avail liquidate, the Ground may be therefore Pointed. But if the Marriage were only personal, it should signify little, and the apparent Heir renouncing, would thereby free himself of it.

N. A Vassal of Lands holding Ward of the King, did Feu the same before the Year 1633, when it was lawful to Feu Lands holden Ward of the King; and when the said Feu was granted, the Disponer did grant a general Discharge of the Feu-Duty, except during the Ward; and for securing the Feuar, having bought the saids Lands as *optima maxima*, at as high a Price, as if the Lands had holden otherwise, that he and his Successors should not be liable to the Feu-Duty, during the Ward; the Disponer was obliged to infeft the Feuar in an Annualrent out of other Lands, equivalent to the Feu-duty; suspending always the Effect of the said Right, except during the Ward. *Quæritur*; *1mo.* If the said general Discharge, with an Obligement to grant particular Discharges when required, will militate against singular Successors, being *in rem?* Answer, Tis thought that it will not; unless the same were by way of Provision in the Charter and Sasine.

The Feuar having ever possest since the granting of the said Right; but not being infeft upon the said Obligement to infeft in an Annualrent, for Relief of the Feu-duty: *Quæritur*, If the Feuar should pursue upon the said Obligement; If it may be obtruded that it is prescribed? *Ratio Dubitandi*, That the said Obligement is a Part of the Feuar's Right; and the Feuar has been in Possession by Virtue of his Right all the Time: And if the Feuar had not been infeft upon the Feu-charter, and had been

in Poſſeſſion by [illegible] ſame, would [illegible] Charter, with a [illegible] Right was preſcribed.

S. If the above [illegible] Sub-vaſſal's Charter and Saſine, they would hold [illegible] Succeſſor; but otherwiſe, they would be debateable; for the Contrivance is manifeſtly Heteroclyte. The Author inclines to think, That tho' the Feuar were not infeft upon the ſaid Obligement in the foreſaid Annualrent for a Relief of the Feu-duty; yet the Obligement ſhould not preſcribe, becauſe a Part of the Feu-Right, and the Feuar in Poſſeſſion by vertue of his Right. But the Annualrent was not to be [illegible] other Lands, which might poſſibly be acquired without Regard to it: So that 'tis thought, the Acquirer poſſeſſing by vertue of his Charter and Saſine for the Space of Forty Years, might well defend himſelf againſt the ſaid Obligement; for it is not ſo much as an Infeſtment of Warrandice.

N. When Ward-Lands were Feued which did hold of the King before the Year 1633, the Feuar during the Ward was only liable to the Feu-Duty by the old Act of Parliament, allowing the Feuing of ſuch Lands: But there is no mention of the Marriage in the ſaid Act of Parliament. *Quæritur* therefore, Whether the Marriage of the Diſponer and his Succeſſors will affect ſuch Feus? *It is Anſwered*, That it is thought, not; ſeeing the ſetting of Feus being allowed, it appears, that Feuars ſhould be only liable to the Feu-Duty.

S. When Feus were allowed, and the Feuar by Act of Parliament only liable to the Feu-Duty, during the Setter's Ward. There can be no Queſtion, but that this Feuar was alſo freed of the Marriage, that might fall by the Setter.

N. If Lands holden Ward of the King, be feued after the Year 1633, and the King ſhould queſtion the ſaid Feu as null, being contrare to the Act of Parliament: *Quæritur*, If Preſcription may be alledged and obtruded againſt the King? *Ratio Dubitandi*, That the Right is null *ab initio*, and cannot be a Warrand and Ground of Preſcription: *Et quoa nullum eſt, nullum ſortitur Juris effectum.*

S. 'Tis clear, That Preſcription excludes all Nullities, ſave Falſhood, and even the King in this Caſe could not be helped, except he ſhould throw the Blame upon his Officers, on the Ground of the Act of Parliament. *Ja.* 6. Par. 16. *Cap.* 14. Which yet ſhould hardly be allowed, againſt the long Preſcription, unleſs the Lands were of the annexed Property, as to which the King is ſtill held to be Minor.

N. A Vaſſal of Ward-Lands holden of the King, having Feued the ſame conform to the Act of Parliament warranting ſuch Feus: *Quæritur*, If the Vaſſal be forefault, whether ſuch Feus will fall under the Forfaulture; if they be not confirmed? Answer, It is thought, the King for himſelf, and his Succeſſors, by the ſaid Act, did conſent to all Feus, that are granted by Vertue thereof: So that the ſame is equivalent to a Confirmation.

S. The foresaid Acts, being equivalent to the King's Confirmation; will certainly save these Feus from falling under the Forfeiture of the Granter.

Taxt-Ward.

N. A Gift being granted of Wards simple or Taxt, falling within a certain time. *Quæritur*, If the Donator will have Right to the Taxt-Ward for Terms thereafter. Answer, He will have Right to the same; if the Taxt-Ward has fallen within the said Time, as the whole Time of the Ward; seeing Ward is to be considered as *Jus integrum*; and *Dies cedit* when ever it falls, albeit *non venit*.

S. If a Taxt-Ward fall due within the Time of the Gift, the Donatar will have the Benefit, even of the after-Years: For so he would have the Benefit of simple Ward, falling within the Time prefixed; even as to after Years. For in this Case it is intended, That the Donatar may compone the same.

Warrandice.

N. A Bond being assigned with absolute Warrandice: *Quæritur*, What is the import of the said Warrandice? And if the Cedent should be liable, if the Debitor be or should become Insolvent? Answer, It will import only that the Debt is true, and due by a valid Bond; but not that the Cedent should be obliged to warrant the Condition of the Debitor, the Law being express to that Purpose, that he should warrant *deberi*, but not *Debitorem locupletem esse*. As was found in the Case of Mr. *Robert Barclay*.

Quid Juris, If the Warrandice be in these Terms, that the Debitor is *Locuples*, and he be truly so for the Time, but he becomes Insolvent?

S, The Author says well, That the Import of *absolute Warrandice*, in the Assignation of a Bond, is only, That the Debt is true, and the Bond good and valid; but not that the Debitor is sufficient. But if the Warrandice be in these Terms, *That the Debitor is also sufficient*, he must be so at the Time of granting the Warrandice, but it cannot oblige for his after Insolvency.

Infeftment of Warrandice.

N. IF an Infeftment of Warrandice, being only base, will be construed to be publick by Possession; by reason of the Possession of the principal Lands?

S. An Infeftment of Warrandice, tho' base, yet is construed to be publick by the Possession of the principal Lands; tho' this might be very hard against a lawful Purchaser of the Warrandice Lands, who hath hardly the Means to discover this Incumbrance.

Waste.

N. WASTE being committed by a Liferenter or Wadſetter; and the Heritor deceaſing or diſponing the Lands; Whether will the Action for the ſame be competent to the Heir of the Heritor, or to his Executors, or ſingular Succeſſors? *Anſwer.* It is thought, it will belong to the Heir, or ſingular Succeſſor, being *Actio in Rem*: And ſo it is by the *Engliſh* Law.

S. If a Liferenter or Wadſetter commit Waſte, and the Heritor deceaſe or diſpone the Lands; 'tis probable, that the Action of Waſte would tranſmit to his Heir; but, how it ſhould belong to his ſingular Succeſſor, does not anſwer the Analogy of our Law; there being nothing *Real* in it.

Witneſſes.

N. THE Queſtion being of the Juriſdiction of a Town; May the Burgeſſes be Witneſſes?

S. A Burgeſs may (no doubt) be Witneſs in Behalf of his Burgh: For, there appears no Reaſon, why his Burgeſhip ſhould make an Exception.

N. THE neceſſary Qualification of a Witneſs being Honeſty and Integrity; which, though preſumed in all Perſons, yet cannot be thought to have been in theſe, who, by Sentence on their own Confeſſion, are evidently *Criminoſi*, and guilty of the higheſt Crimes. It would ſeem, that a Remiſſion may free as to Puniſhment, and may repone as to all other Capacities, and as to the King's own Intereſt; but not as to that, which, in Behalf of the People, requires Integrity: And the King, by a Remiſſion, may free a Pain, but not a Guilt; and cannot repone to Innocency.

S. Certainly, A Perſon guilty of a Crime inferring Infamy, is not *omni exceptione major*: And, tho' a Remiſſion may free him from all Things Penal; Yet, it cannot be thought to reſtore him to Integrity, or, to the Probity of a Witneſs; ſpecially, ſince this is the Concernment of Righteous Judgment in behalf of other Parties.

N. THE Law of the Majeſty, and the Statutes of King *William*, *Chap.* 11. *Of theſe who are infamous*; And the Statutes of *Robert* I. *Cap.* 34. *Of theſe who are repelled from Teſtimony*; are clear, That *Socii criminis* cannot be Witneſſes; and *Convicti & Redempti* cannot be Witneſſes: *Quæritur* therefore, If a Perſon convict of Treaſon, and remitted that he may be Witneſs againſt others, can be Witneſs? Eſpecially, that Law bearing, That *Conducti prece vel pretio* cannot be Witneſſes: And there can be no greater *pretium* than a Man's Life; *Skin for Skin*, &c.

S. *Socii Criminis* being often neceſſary; If they be firſt either purged or indemnified, are in uſe to be admitted Witneſſes: Altho' a Remiſſion or Indemnity may juſtly be thought ſtill a Ground of Exception, as if they

they were *conducti Prete aut Pretio*. And ſo it may be well judged, except in ſome Flagrant Caſes; as *Diſaffections* or *Inſurrections*, wherein other Evidence cannot be had.

Women Witneſſes.

N. Quer. IF Women Witneſſes may be admitted in the Caſe of Divorce, to prove Adultery? ANSWER, This Queſtion is under Debate, upon Advocation from the Commiſſars of *Edinburgh*, having admitted the ſame: And that they ſhould not be admitted. 1*mo*. That by our Law, *Cap.* 23. *Stat. Rob.* I. Women are not habile Witneſſes. And by the Cuſtom (except *in caſu Puerperii*, to prove the Birth of Children, to give the Husband the Benefit of Courteſy) And by the Canon Law, *Decretal. De verborum ſignificatione, Cap.* 10. And on the other part, 'Tis urged by the Civil Law, they may be Witneſſes, except in Teſtaments: And by the Canon Law, They may be Witneſſes *in cauſa Matrimoniali*; And by our Cuſtom, *in triminibus occultis & domeſticis*; and *in atrocioribus*, as Murder, Treaſon and Falſhood. And in anſwer, 'Tis urged, That where the Civil Law is altered by the Canon, that is to be followed; and that Women cannot prove Marriage, and ought not to prove the Diſſolution: And, *in cauſa Matrimonii*, Witneſſes ſhould be above all Exception, *Cap.* 1. *De Conſanguinitate*. And if any of the Canoniſts were of another Opinion, it was becauſe the Effect of Divorce was, *ſeparatio Menſæ & Thori*; *non Vinculi*: And in Treaſon and ſuch Crimes, much is indulged *ad vindictam publicam*; but not *ad vindictam privatam*, when ſuch Purſuits are only for private Intereſt. And 'tis not preſum'd that the King's Advocate will corrupt Witneſſes. And in whatever Caſe, either by the Canon Law or ours, Women are admitted; 'tis only, *ubi conſtat de corpore delicti*; which is not in Adultery, where there is not a Child. And in whatever Caſe (even when the Publick is concerned) Women are never admitted, but to adminiculate: And, *quando concurrit unus teſtis habilis, ſupplet inhabilitatem alterius*. And there being Forty or Fifty Proceſſes of Adultery within this Hundred Years, Women Witneſſes were never received. And they are not admitted *in cauſa ſcandali* before the Commiſſars, to prove *injuria verborum*; much leſs *in crimine Adulterii*.

S. THIS *Queſtion* of admitting Women to be Witneſſes doth often occur; And the *Author* inclines to think they ſhould not be admitted to prove Adultery for Divorce: And yet this is an *occult* Crime: And *in criminibus occultis & domeſticis*, and in all *atrocioribus*; as Murder, Treaſon and Falſhood, they are admitted. As for the Stat. *Rob.* I. *Cap.* 34. about the Quality of Witneſſes; 'Tis juſtly in Deſuetude, and contains manifeſt Abſurdities; as, That a Laick may not be admitted againſt a Clerk. But, waving what either *Civilians* or *Canoniſts* may alledge in this Matter; the beſt and plaineſt Rules would ſeem to be;

Firſt, THAT *Women* ſhould never be allowed to be *Inſtrumentary* Witneſſes; or, where there are *Teſtes requiſiti*; and, where there may be a Choice; for there, *Men* ſhould be preferred.

Secondly, IN Criminals, and Matters of Fact, where there appears *no Penury* of Men Witneſſes; as, a Fact or Rencontre happening in the High-ſtreet, or any Publick Place, in the open Day; if Women only ſhould be adduced as Witneſſes in ſuch a Caſe, it might be judged ſuſpicious. But, where there is no ſuch Ground of Suſpicion; and where by the

Circumſtances they appear to [illegible] ſuch to be proven falls out under Cloud [illegible] in any Corner or ſolitary Place; there can be no Reaſon [illegible] Women to be Witneſſes; unleſs we deny them the Conſcience and Knowledge of an Oath: For in effect, as Crimes fall out with a great Deal of Variety and Uncertainty; Providence ſhould be regarded [illegible] Men or Women, that can be found, with any Probability for an Evidence. But,

Thirdly, As to Civil Cauſes and Matters, which are oft-times of Bargains and Negotiations among Men; *Women* ought not to be admitted Witneſſes: For theſe things are out of *their* Way. And 'tis hoped, theſe Rules may ſtill more and more obtain; tho' *Cuſtom* hath long been croſs in this Matter. And which Unluckineſs of Cuſtom appears alſo in another Point: For,

In a Civil Cauſe, we refuſe a *Moveable* Tenent of either Party, to be a Witneſs for him: And yet, we admit his Cottar; who ſeems not to be ſo credible. And beſides, ſince the Act of Parl. Q. *Mary*, anent Removings, there is not properly, a *Moveable* Tenent in *Scotland*: For now, no Labourer can be removed without a *Warning*: And it was before that Time, when Tenents might have been caſt out, if they wanted Tacks, *pro arbitrio* of the Maſter; That *That* Exception took place. But, 'tis very plain, that it ought to have been, and now ſhould be diſuſed, on the ground above-mentioned.

Obligements for Proviſion of Wives.

N. If a Perſon be obliged by a Contract of Marriage, to employ a Sum of Money to himſelf and his Wife the longeſt Liver in Liferent; and to his Heirs. *Quæritur*, If the ſaid Obligement be not performed, what Courſe the Relict may take to affect thereupon his Eſtate having no Heirs, Creditors being in Competition of Diligence? And if ſhe may not purſue his Appearand Heir as lawfully charged, making mention of the Obligement, and that the Heir will not perform the ſame; and that *loco facti ſuccedit intereſſe*: And therefore to hear and ſee him decerned to pay and make furthcoming to her the ſaid Sum, that it may be employed conform to the ſaid Obligement; and to hear and ſee it found and declared, that the ſame Execution ſhall follow upon the Adjudication or otherwiſe, as is competent to other Creditors?

If a Relict will be preferable to the other Creditors?

S. We met with this before, and 'tis ſtill thought, That the Relict, being Creditor by her Contract of Marriage, may purſue as any other Creditor, for affecting both the Executry and Heritage; and thus obtain a Decreet to liquidate her Intereſt, and get the Heritage adjudged for Implement and Security of her Jointure-Obligement: Which is indeed to adjudge to her an equivalent Annuity.

It is thought very juſt, That a Relict ſhould be preferred to other Creditors, for the Obligements of her Contract; ſeeing in the Husband's Life, ſhe cannot act for her ſelf: And all Perſons dealing with a Husband, may know him to have a Wife; and ſo may be aware of it. And thus the Commiſſars of *Edinburgh*, do alwiſe prefer the Relict, but, the Lords of Seſſion have inclined otherwiſe of late.

Woods.

Woods.

N. WHEN a Liferenter is Infeft *cum Nemoribus*: *Quæritur, Quid Juris*, When the Wood falleth to be cut during the Liferent?

S, A Liferenter can only have the uſe of Woods for her ordinary Exigences, as for Fewel; or for beeting of the Liferent-Houſes: But ſhe cannot pretend to the cutting and ſelling of the Woods; unleſs the Woods were *ſylvæ cæduæ*, and in uſe to be cut in her Husband's Time, by yearly Haggs: For ſo, ſhe may continue her Liferent of the Woods, and 'tis like, it was ſo intended.

Wrack.

N. IF Ships or Barges belonging to this Kingdom, do make Ship-Wrack within the ſame: *Quæritur*, Whether the Repreſentatives of the Owners may claim the Goods, and not the King? Or any Infeft *cum Wrack*? *Ratio Dubitandi*, That by the Act of Parliament, *Ja. 6. Par. 9. Cap.* 124. Ships belonging to theſe Nations, where that Law has not Place, are to be in another Caſe, than the Ships belonging to the Nations where the Law anent Ship-Wrack has Place: And it ſeems reaſonable, that the King's own Subjects and their Ships ſhould be in as good Caſe, as the Ships of any Nation whatſoever, and that their Ships and Goods ſhould not be loſt upon Pretence of Wrack, unleſs there were a poſitive Law to that Purpoſe: And the foreſaid Act implies, that it is *Triſte Lucrum*, and not to be owned but *Lege Tallionis*.

S. WHEN our own Ships or Barges make Ship-Wrack within the Kingdom, 'tis thought, They ſhould not be in the Caſe of Forreign Wrack.

As for the Act of Parliament, *Ja.* VI. *Par. 9. Cap.* 124. Which eſtabliſhed a *Lex Tallionis* betwixt us and Strangers; I never ſee it obſerved. But all Wracks, *That is*, where no living Creature is Safe, is claimed promiſcuouſly by ſuch as pretend Right thereto. And even where there is no proper Wrack, yet the *Salvage*, a Fifth Part, and other demands of the *Admiralty*, do add to the Affliction of the Afflicted. But as for *Scots* Ships and Barges, 'tis thought, the Owners ſhould always be *heard*, paying the neceſſary Expences. Yet 'tis doubted, this would be obſerved, becauſe of the rapacious Covetouſneſs of all Coaſters in thoſe Caſes.

Z.

The Caſe of the Admiralty of Orknay *and* Zetland, *repreſented in Behalf of the King, in Anſwer to the Duke of* Lennox's *Claim thereto.*

N. BY a Charter under the Great Seal, *in anno* 1603, his Majeſty's Grandfather did give and grant to *Lodovick* Duke of *Lennox*, the Office of Admiralty, in theſe Terms, *Totum & integrum Officium Admiralitatis noſtri Regni, cum omnibus privilegiis, honoribus & Commoditatibus eidem ſpectantibus.*

THE ſaid Charter is not only of the ſaid Office, but of the Dukedom of *Lennox*, and of the Lands therein-mentioned, belonging to the ſame. And as to the ſaid Lands and Dukedom, the ſaid Charter is upon the Duke's Reſignation, the ſame having formerly pertained to him: But as to the ſaid Office of Admiralty, the ſame is not given upon the Duke's Reſignation, but is caſten in the *Novodamus*; whereas the Clauſes of *Novodamus* do not uſually contain, as to the Subject diſponed, more nor did formerly belong to the Reſigner; ſeeing *de novo dare & renovare* doth ſuppoſe a former and pre-exiſtent Right. There are indeed Ratifications in Parliament, of *Lodovick* Duke of *Lennox* his Right of the Office of the Admiralty; but it is to be conſidered, that by ancient Laws and Acts of Parliament, it is ſtatute, That heritable Offices ſhould not be given, or diſponed in Fee or Heritage; and if they ſhould *de facto* be diſponed, they ſhould be given with great Deliberation, and Deliverance of the Parliament, as appears by the Acts 43 and 44 King *James* VI. his 11th Parliament.

RATIFICATIONS do ordinarly paſs in Parliament, of Courſe, without voting, the very laſt Hour of the Parliament, when it is to diſſolve; and how little Weight ſhould be laid upon the ſame, it appears by the Ratification produced for his Grace the Duke of *Lennox*, dated 23 of *October* 1612, which doth ratify the Infeftment granted to the ſaid *Lodovick* Duke of *Lennox*, of the Offices of Great Admiral of *Scotland*, and of all the Iſles and Bounds thereof, with the Offices of Lieutenendry upon the Seas, and Colonelſhip, and Juſtice-General, and Office of Judicatory Criminal and Civil, with all the Privileges, Dignities, and Caſualities of the ſame, ſet down in the ſaid Infeftment; albeit no ſuch Infeftment, for any Thing known, is or can be produced: And the foreſaid Infeftment in the Year 1603, granted to the Duke of *Lennox*, is only ſimple, of the Office of Admiralty *Regni noſtri*, without any Mention of the Iſles, or of the Office of Lieutenendry upon the Seas or Colonelſhip, and Juſtice-General, and of the Office Judicatory Criminal and Civil; and the ſaid Act of Parliament is blank as to the Date of the Infeftment, which is ratified; whereas, if there had been any ſuch Infeftment of the Tenor and Extent foreſaid, it would have then been produced the Time of the ſaid Ratification; and, if it had been then produced, the Ratification would have expreſſed the Date of the ſame.

It appears by certain other Papers now produced by the Duke, for clearing his Intereſt, That the claim of that honourable Family was only of the Office of Admiralty of the Kingdom, without any Mention of the Iſles, and much leſs of *Orknay* and *Zetland*; in ſo far as his Majeſty's Father's Letter, 16 *June* 1628, of which the Extract is produced, doth bear, That he had been pleaſed to ſign a Signature, in Favours of the Duke of *Lennox*, of the heritable Office of Admiralty of this his Kingdom: And, in the Act of Parliament produced, of the Date 28 *June* 1633, Mention is made, that the deceaſed *James* Duke of *Lennox* ſtood infeft as Heir to the ſaid *Lodovick* Duke of *Lennox*, in the Office of Admiralty of this Kingdom, without the leaſt Mention of *Orknay* and *Zetland*.

It appears by the Writs produced for the Duke, That until the Earl of *Mortoun*'s Grandfather obtained a Gift and Right of *Orknay* and *Zetland* from His Majeſty's Father; the Duke of *Lennox*'s Right, as to the Admiralty of *Orknay* and *Zetland*, was ever queſtioned and controverted by His Majeſty's Officers: In ſo far, that upon the laſt of *March*, 1628, the King did ſet a Tack of the Earldom of *Orknay* and *Zetland*, to *Archibald* Lord *Naper*, containing a Right likewiſe of the Admiralty within the Bounds of *Orknay* and *Zetland*: And the Earl of *Linlithgow* having appeared in behalf of the deceaſed *James* Duke of *Lennox*; the ſaid Lord *Naper* declared, That he ſhould be ruled as to the ſaid Right of Admiralty, according as his Majeſty ſhall declare his Will thereanent; whereas, if the Duke's Right had been clear and unqueſtionable, neither a Tack would have been ſet of the Admiralty of *Orknay* and *Zetland*, neither would there have been any Reference made to his Majeſty; but upon the Earl of *Linlithgow*'s appearing, and Repreſentation of the Duke's Right, the Clauſe of the ſaid Tack as to the Admiralty of *Orknay* and *Zetland*, would have been delete.

As to Poſſeſſion; the Earls of *Mortoun* have been in Poſſeſſion of the Admiralty of *Orknay*, upon a Gift and Right from His Majeſty, ever ſince the Earl of *Mortoun*'s Grandfather obttained the Right of *Orknay*.

There is produced for the Duke, The Double of a Gift granted to the Earl of *Linlithgow* of the Admiralty of the whole Kingdom of *Scotland*, and Iſles thereof; and, of the Lieutenentry, Juſticiary and General of the Sea; with Conſent of the deceaſt *James* Duke of *Lennox*, and of his Curators; the ſaid Earl being a Confident Perſon and Relation of the ſaid noble Family; and without Prejudice of the Duke's Right. But it is to be conſidered, That the ſaid Paper is only a Double, and not authentick: And the ſaid Right is only granted during the Minority of the ſaid Duke of *Lennox*, and is not given upon a Suppoſition and Narrative of the Duke's Right: Whereas no Right has been, or, for any Thing that can be ſeen, can be ſhown; that the Dukes of *Lennox* have Right expreſly of the Admirality of the *Iſles*, and of the Offices of Lieutenendry and Juſticiary.

As to the Privileges and Caſualities belonging to the Admiralty of *Orknay* and *Zetland*; it is repreſented, That the Privileges and Caſualities of the Admiralty are not ſpecified nor defined in any Charter or Record, for any Thing that does appear: The Charter foreſaid granted to *Lodovick* Duke of *Lennox*, *in Anno* 1603, bearing only (as ſaid is) *Cum Privilegijs & commoditatibus eiſdem Spectantibus:* And the Charter granted to *Adam Hepburn* Earl of *Bothwell* in the Year 1511 (which is the moſt ancient Record of Admiralty that we have ſeen) bearing only the ſaid Office of Admiral *Totius Regni*, to be given to the ſaid *Adam*, *Cum omnibus Libertatibus proficuis & eſchetis ejuſdem*; without

[illegible]

It appear by [illegible]
[illegible] of the Admiralty [illegible]
the 12th Parliament [illegible]
Francis Earl of Bothwel, [illegible]
er Specialities; and divers [illegible]
ments of Admiralty, the [illegible] confirmed by
the said Act of Parliament, [illegible] exerce no Jurisdiction, nor exact no Duty nor Casualty, but that which was in use to be exercised and taken by the Admiral for the Time, before the Death of King *James* V. And therefore it is humbly conceived, That whosoever shall be found to have Right to the [illegible] *Orkney* and *Zetland*; 'tis fit, that the Privileges and Casualities of the same, be so defined and cleared, that the Fishing Trade and Trade may be not interrupted nor disturbed; Also, that His Majesty be not prejudged of his Rents of *Orkney*.

It is humbly represented to His Majesty's Consideration, the Records being for the most Part lost, which might have cleared His Majesty's Interest; and the Right of Admiralty being granted to the Duke of *Lennox* in Manner foresaid; and neither the Duke's Right, nor the Right of Admiralty granted to the preceeding Admirals, being found as to the Isles of *Orkney* and *Zetland*; and the said Isles of *Orkney* being the King's Property, and feued only to the Earls of *Orkney*, and now annexed to the Crown; and the said Isles being so remote, and of so vast Extent, and formerly possessed by the King of *Denmark*, and upon Transactions with the said King, which are not very ancient, being reunited to this Kingdom: Whether or not the Right of Admiralty granted to the Dukes of *Lennox* ought to be extended to the said Isles of *Orkney* and *Zetland*?

S. Here, the Author gives his Grounds, why the Right of the Admiralty of *Scotland*, granted by the King to the Dukes of *Lennox*, ought not to be extended to the Isles of *Orkney* and *Zetland*: And his Reasons appear to be of Weight. And the Queen, at this Day, seems to distinguish the said Isles, from the Duke of *Lennox*'s Right; as appears from the Two late Gifts and Charters granted by her Majesty; One to the Duke of *Montrose*, of the Estate of *Lennox*, with the Admiralty thereto belonging; and the other, to the Earl of *Morton*, of the Earldom of *Orkney*, and Lordship of *Zetland*. But the Matter will be best understood, by considering the said Two Charters, and what is provided in both, with relation to the said Admiralty.

FINIS.

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